portant is the fact that in order for the securities market to run efficiently, there must exist an identifiable code of conduct. If the judiciary is going to imply a private remedy under rule 10b-5, the standards should be clearly enumerated. The availability of a due diligence defense will often determine the outcome of a rule 10b-5 action, and this prospect of success should not be contingent upon the particular circuit in which the law suit is filed.

LEX L. VENDITTI

Indiana Law Review

Volume 11 1978 Number 4

Articles

Comment

Notes

Volume 11 June 1978 Number 4

The INDIANA LAW REVIEW is the property of Indiana University and is published four times yearly, January, February, April, and June, by the Indiana University School of Law—Indianapolis, which assumes complete editorial responsibility therefor. Subscription rates: one year, $12.50; three years, $35.00; five years, $50.00; foreign $14.00. Single copies: annual Survey issue, $6.00; other issues, $3.50. Back issues, volume 1 through volume 8, number 1, are available from Fred B. Rothman & Co., 57 Leuning Street, South Hackensack, New Jersey 07606. Please notify us one month in advance of any change in address and include both old and new addresses with zip codes to ensure delivery of all issues. Send all correspondence to Editorial Assistant, Indiana Law Review, Indiana University School of Law—Indianapolis, 735 West New York Street, Indianapolis, Indiana 46202. Publication office: 735 West New York Street, Indianapolis, Indiana 46202. Second class postage paid at Indianapolis, Indiana 46201.

Indiana University School of Law—Indianapolis
1977-1978 ADMINISTRATIVE OFFICERS AND FACULTY

JOHN W. RYAN, PH.D., *President of the University*

GLENN W. IRWIN, JR., M.D., *Vice President of the University*

WILLIAM F. HARVEY, LL.M., *Dean, Indiana University School of Law—Indianapolis*

G. KENT FRANDSEN, J.D., *Assistant Dean, Indiana University School of Law—Indianapolis.*

MARSHALL J. SEIDMAN, LL.M., *Assistant Dean for Administration and Finance, Indiana University School of Law—Indianapolis*

THOMAS B. ALLINGTON, LL.M. (New York University, 1971), *Professor* (on leave, second semester, 1977-78)

JAMES F. BAILEY, III, J.D., M.A.L.S. (University of Michigan, 1964, 1970), *Director of Library and Associate Professor*

AGNES BARRETT, J.D. (Indiana University, 1964), *Associate Professor*

GERALD L. BEPKO, LL.M. (Yale University, 1972), *Professor*

BERNARD J. BOYLE, J.D. (DePaul University, 1949), *Visiting Associate Professor and Director of Clinical Education and Placement*

CLYDE H. CROCKETT, LL.M. (The London School of Economics, 1972), *Associate Professor*

DEBRA A. FALENDER, J.D. (Indiana University, 1975), *Assistant Professor*

CLEON H. FOUST, J.D. (University of Arizona, 1933), *Professor*

G. KENT FRANDSEN, J.D. (Indiana University, 1965), *Assistant Dean and Associate Professor*

DAVID A. FUNK, LL.M. (Columbia University, 1973), *Professor*

PAUL J. GALANTI, J.D. (University of Chicago, 1963), *Professor*

HELEN P. GARFIELD, J.D. (University of Colorado, 1967), *Associate Professor*

ALAN H. GOLDSTEIN, J.D. (Indiana University, 1969), *Lecturer*

HAROLD GREENBERG, J.D. (University of Pennsylvania, 1962), *Associate Professor*

JOHN S. GRIMES, J.D. (Indiana University, 1931), *Professor of Jurisprudence Emeritus*

JEFFREY W. GROVE, J.D. (George Washington University, 1969), *Associate Professor*

WILLIAM F. HARVEY, LL.M. (Georgetown University, 1961), *Dean and Professor*

LAWRENCE A. JEGEN, III, LL.M. (New York University, 1963), *Professor*

WILLIAM R. JONES, LL.M. (University of Michigan, 1970), *Professor*

HENRY C. KARLSON, LL.M. (University of Illinois, 1977), *Assistant Professor*

CHARLES D. KELSO, J.S.D. (Columbia University, 1968), *Professor*

WILLIAM A. KERR, LL.M. (Harvard University, 1958), *Professor*

WALTER W. KRIEGER, JR., LL.M. (George Washington University, 1969), *Associate Professor*

WILLIAM E. MARSH, J.D. (University of Nebraska, 1968), *Associate Professor*

MELVIN C. POLAND, LL.M. (University of Michigan, 1950), *Professor*

RONALD W. POLSTON, LL.B. (University of Illinois, 1958), *Professor*

GARY A. RATNER, LL.M. (Yale University, 1974), *Associate Professor*

CHARLES G. REEDER, J.D. (Indiana University, 1965), *Lecturer*

MARSHALL J. SEIDMAN, LL.M. (Harvard University, 1970), *Assistant Dean for Administration and Finance and Professor*

WILLIAM A. STANMEYER, J.D. (DePaul University, 1966), *Associate Professor* (on leave 1977-78)

KENNETH M. STROUD, J.D. (Indiana University, 1961), *Associate Professor*

JAMES W. TORKE, J.D. (University of Wisconsin, 1968), *Associate Professor*

R. BRUCE TOWNSEND, J.D. (University of Iowa, 1940), *Professor of Jurisprudence*

JAMES P. WHITE, LL.M. (George Washington University, 1959), *Professor* (on leave)

HAROLD R. WOODARD, J.D. (Harvard University, 1936), *Professorial Lecturer*

Indiana Law Review

Volume 11 1978 Number 4

Protective Provisions for Surviving Spouses in Indiana: Considerations for a Legislative Response to *Leazenby*

DEBRA A. FALENDER*

In Indiana, at least in theory, a surviving spouse may not be disinherited by his or her deceased wife or husband. The surviving spouse is entitled to a survivor's allowance of $8,500 from the assets in the decedent's estate and, in addition, may ignore the provisions of the decedent's will and elect to take a statutory share of the estate.[1] These estate-based protective provisions may result in either overprotection[2] or underprotection[3] of a surviving spouse. If

*Assistant Professor of Law, Indiana University Law School—Indianapolis, J.D., 1975, Indiana University Law School—Indianapolis, A.B., 1970, Mount Holyoke College.

[1]IND. CODE §§ 29-1-3-1, -4-1 (1976 & Supp. 1978). These provisions are explained in detail in the text accompanying notes 8-32 *infra*.

[2]The term "overprotection," as used throughout this discussion, refers to any situation in which the spouse is unnecessarily able to interfere with the decedent's free disposition of property. "Unnecessarily" is the key word. "Unnecessarily" is not used in the sense of actual need, but is used to suggest that freedom of alienation is a treasured incident of the ownership of property. Assuming, arbitrarily, that a spouse is adequately protected from disinheritance by receipt of one-third of the accumulated family wealth (the one-third being derived from the fact that the spouse's statutory forced share typically is one-third), overprotection occurs if the decedent has seen to it, by inter vivos, extra-estate arrangements such as life insurance, pension funds, trusts, gifts, or joint survivorship ownership of real and personal property, that the spouse will receive at least one-third of the wealth at the decedent's death. The spouse is unnecessarily protected (overprotected) by a right to receive more than one-third of the wealth when the decedent's intent is that the excess be distributed in another manner. Assume, for example, that *H*, on July 1, 1977, owned net assets of $100,000 in his name alone. If *H* died on July 1, his wife, *W*, would be entitled to $8,500 (the survivor's allowance) plus one-third (the statutory elective share) of the remaining $91,500 ($100,000 less $8,500), a total of $39,000, no matter what provision *H* made for *W* in his will. IND. CODE §§ 29-1-3-1, -4-1 (1976 & Supp. 1978). If *H* decided to share legal ownership of his property with *W* during his lifetime, for example, by putting $50,000 in a joint savings account in his and his wife's name, then at *H*'s death (still assuming a total of $100,000 in assets), *W* could take not only the $50,000 in the savings account by survivorship, but also the survivor's allowance of $8,500 plus an elective share of one-third of the remaining $41,500 ($50,000 less $8,500), a total of $72,333, no matter what provision *H* made for *W* in his will. *Id.* If *H* intended that the $50,000 remaining in his estate after the inter vivos transfer to *W* pass by will to persons other than *W*, *W* has been overprotected—that is, allowed to unnecessarily interfere with *H*'s right to freely dispose of his property.

[3]The term "underprotection," as used throughout this discussion, refers to a

the decedent has depleted his or her estate by inter vivos transfers to third parties, the protection afforded by the statutory provisions may be insignificant. On the other hand, if the decedent has adequately, or even abundantly, provided for the surviving spouse by inter vivos transfers and arrangements, the spouse may still disrupt the decedent's estate distribution scheme by asserting his or her statutory rights.

The primary purpose of this discussion is to review recent legislative enactments in other jurisdictions to see how those states have attempted to avoid the underprotective and overprotective inadequacies inherent in an estate-based protective scheme and to see if there are statutes that could serve as models if the Indiana legislature should choose to address the underprotection/overprotection problem. First the stage must be set by reviewing the present state of law and policy in Indiana regarding the right of a surviving spouse to a share of the deceased spouse's estate.

It is assumed throughout this discussion that forced protection of the surviving spouse is a justifiable infringement upon a testator's freedom of alienation.[4] It is also assumed that "economy of judicial

---

situation in which the spouse is deprived of a share of property that the decedent owns in substance, but not in form. For example, if *H* placed his entire $100,000 (*see* note 2 *supra*) in a joint bank account in his and another's name, no assets would be in *H*'s estate at his death, and *W* would be entitled only to an $8,500 survivor's allowance from the funds in the joint account at *H*'s death. IND. CODE §§ 29-1-4-1, 32-4-1.5-3, -4, -6, -7 (1976 & Supp. 1978). Underprotection occurs when the spouse's statutory share does not reflect the extent of assets over which the decedent has essentially all the incidents of ownership at death. Underprotection is societally objectionable if the surviving spouse is left without any means of support.

[4]Some authors have suggested that there is no need for a nonbarrable share for surviving spouses because the surviving spouse is given much more then the statutory one-third in a very high percentage of the wills. *See* Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963). *See also* Plager, *The Spouse's Nonbarrable Share: A Solution in Search of a Problem*, 33 U. CHI. L. REV. 681 (1966). Until reliable empirical data unquestionably support the conclusion that a nonbarrable share is unnecessary, it is reasonable to rely upon the collective wisdom of the legislatures of the 50 states. In only two states, Georgia and South Dakota, is the testator's freedom of alienation unfettered. *See* GA. CODE ANN. § 113-106 (1975), which provides: "A testator, by his will, may make any disposition of his property not inconsistent with the laws or contrary to the policy of the State; he may bequeath his entire estate to strangers, to the exclusion of his wife and children, but . . . the will should be closely scrutinized . . . ." For a variety of reasons, such as the presumption that the spouse has contributed to the accumulation of the family wealth and will pass this wealth along to other family members, coupled with the concern of the state regarding the burden of indigent spouses, the remaining states have chosen to protect the spouse by some form of forced ownership of the other spouse's property. Many non-community property states have traditional estate-based schemes. *E.g.*, ILL. ANN. STAT. ch. 110½ § 2-8 (Smith-Hurd 1978); MISS. CODE ANN. § 91-5-25 (Supp. 1977); OHIO REV. CODE ANN. § 2107.39 (Page 1976); WYO. STAT. ANN. § 2-4-101 (1977). Com-

effort" does not require that an inflexible, but easily calculated, forced-share alternative be retained.[5] The former assumption is supported by the existence of some form of forced protection for surviving spouses in the vast majority of jurisdictions.[6] The latter assumption is supported by the conclusion reached in a 1966 accumulation of available data on patterns of wealth transmission at death:

> [T]he need for a surviving spouse's choice between the deceased spouse's testamentary largess and the legislatively-decreed share is not a need of massive proportions. The machinery designed to satisfy this need need not be massive and insensitive; on the contrary, the dimensions of need are such as to compel the conclusion that the machinery should be keyed to individuation and able to adjust its impact to the circumstances calling it into play.[7]

I. PRESENT STATE OF LAW AND POLICY IN INDIANA

A. Statutory Provisions

The Indiana Probate Code contains three separate but related protective provisions[8] for surviving spouses: A survivor's allowance

---

munity property states and Louisiana protect the spouse by a form of shared inter vivos ownership of material property, with or without provisions allowing the spouse a share of the decedent's separate property. *E.g.*, NEV. REV. STAT. § 134.010 (1973); WASH. REV. CODE ANN. § 11.52.010 (1967). Variations on the traditional estate based schemes will be discussed in text accompanying notes 95-185 *infra*.

[5]If the need is widespread and protection of the surviving spouse is a substantial activity of the courts, then economy of judicial effort alone may require that the forced share alternative be retained . . . . [R]ough justice may be the best that can be hoped for.

On the other hand, if the need is great for the individual, but small in number of cases involved and in total individuals affected, rough justice may be poorer justice than the situation requires. We may be able to afford the luxury of individuation; to protect the surviving spouse who has genuine need, protect the testator's dispositive plan when there is no such need, and do it all without an undue burden on the courts.

Plager, *supra* note 4, at 683.

[6]*See* note 4 *supra*.

[7]Plager, *supra* note 4, at 715.

[8]For purposes of this discussion, a protective provision is one which gives the spouse a share of the decedent's property despite the decedent's expressed contrary intent. Provisions that establish presumptions about the decedent's intent when the decedent fails to express that intent, *e.g.*, IND. CODE § 29-1-2-1 (1976) (intestate succession laws), *id.* § 32-4-1.5-15 (presumptions regarding survivorship ownership of goods and choses in action acquired during coverture), *id.* §§ 32-1-2-7, -2-8 (presumptions regarding survivorship ownership of real estate by husband and wife), are not considered protective, although in practice such provisions do serve to protect spouses from disinheritance.

for widows and widowers,[9] an elective forced heir share for widows and widowers,[10] and a creditor protection provision for widows only.[11]

1. Survivor's Allowance.—A surviving spouse is entitled to an allowance of $8,500 in personal property from the estate of the decedent.[12] A second or subsequent spouse has the same rights as a first spouse. If there is less than $8,500 worth of personal property in the decedent's estate, the spouse is entitled to a lien on the decedent's real property to the extent of the deficiency.[13] The survivor's allowance is a high priority claim[14] against decedent's estate, subject only to costs and expenses of administration and reasonable funeral expenses, and prior to all other claims including debts, taxes, and medical expenses.[15]

The survivor's allowance is, in effect, a nonbarrable interest and will not be defeated except to the extent that the value of the decedent's estate plus funds in multi-party bank accounts[16] is less than $8,500 plus costs and expenses of administration and reasonable funeral expenses. Under the prior, but similar, widow's allowance statute,[17] it was held that the widow could not take the statutory

---

[9]IND. CODE § 29-1-4-1 (Supp. 1978).

[10]*Id.* § 29-1-3-1 (1976).

[11]*Id.* § 29-1-2-2.

[12]*Id.* § 29-1-4-1 (Supp. 1978). If there is no surviving spouse, the decedent's minor children are entitled to divide the $8,500 allowance equally among themselves.

[13]*Id.*

[14]The question of whether the survivor's allowance is a claim that must be timely filed or forever barred under IND. CODE § 29-1-14-1 (1976) or whether it is payable as a matter of right regardless of the spouse's failure to file a timely claim has been resolved by one authority in favor of the conclusion that it is a claim. 2 G. HENRY, THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA 240-41 (6th ed. J. Grimes Supp. 1975).

[15]IND. CODE § 29-1-14-9 (1976).

[16]The spouse may reach "amounts the decedent owned beneficially" in multi-party bank accounts to satisfy the survivor's allowance claim if the assets in the decedent's estate are insufficient. IND. CODE § 32-4-1.5-7 (Supp. 1978). *See* notes 86-92 *infra* and accompanying text.

[17]Act of Mar. 9, 1953, ch. 112, § 402, 1953 Ind. Acts 295, *as amended by* Act of Mar. 11, 1955, ch. 258, § 2, 1955 Ind. Acts 667; Act of Mar. 12, 1965, ch. 379, § 1965 Ind. Acts 1171; Act of Apr. 1, 1971, Pub. L. No. 403, § 1, 1971 Ind. Acts 1892 (repealed 1975). The statute provided that the widow was entitled to select $3,000 worth of inventoried property from the decedent's estate. If the widow failed to select the desired property, she was entitled to the amount of the deficiency in cash from decedent's personal estate, or, if the personal estate was insufficient, the deficit was a lien on decedent's real estate. In addition to the widow's allowance, the statutes provided for a limited homestead right for surviving widows, widowers, and minor children, Act of Mar. 9, 1953, ch. 112, § 401, 1953 Ind. Acts 295, and a discretionary family allowance for surviving widows and minor children, Act of Mar. 9, 1953, ch. 112, § 403, 1953 Ind.

allowance if she took under the will and the provisions of the will were expressly or impliedly inconsistent with her taking both the allowance and the benefits under the will.[18] If the current survivor's allowance statute is similarly interpreted, the decedent could force the survivor who accepts benefits of the will to forego the statutory allowance.[19] The spouse, however, may always renounce the will benefits and take under the law.[20]

2. Elective Forced Heir Share.—If the decedent dies testate, his or her surviving spouse may elect to take against the will one-third of the decedent's net personal and real estate.[21] If the spouse is a "second or other subsequent spouse who did not at any time have children by the decedent and the decedent left surviving him a child or children or the descendants of a child or children by a previous spouse,"[22] then the elective share is one-third of the decedent's net personal property, but only a life estate in one-third of the decedent's lands.[23] A spouse, presumably, may receive both the survivor's allowance and the forced heir share.[24]

Acts 295, *as amended by* Act of Apr. 1, 1971, Pub. L. No. 403, § 2, 1971 Ind. Acts 1892. All three provisions were repealed when the survivor's allowance statute was enacted.

[18]*E.g.*, Barker v. Barker, 116 Ind. App. 265, 63 N.E.2d 429 (1945); Snodgrass v. Meeks, 12 Ind. App. 70, 38 N.E. 833 (1894).

[19]IND. CODE § 29-1-3-7 (Supp. 1978) provides in part: "By taking under the will or consenting thereto, [the surviving spouse] does not waive his right to the allowance, unless it clearly appears from the will that the provision therein made for him was intended to be in lieu of that right."

[20]Any beneficiary may renounce in whole or in part the succession to any property. IND. CODE § 29-1-6-4 (1976). If the beneficiary renounces his interest under the will, provisions of the will requiring an election between taking under the will and under the law are ineffective. *See* discussion of election in note 25 *infra*.

[21]IND. CODE § 29-1-3-1(a) (1976).

[22]*Id.* Such a spouse is referred to as a subsequent childless spouse.

[23]The elective share provision tracks the intestate succession provision for first and subsequent childless surviving spouses, except that the elective share of one-third is the spouse's minimum intestate share. Depending on whether and how many children or parents survive the decedent, the spouse of an intestate decedent may receive more than one-third of the intestate estate. *Id.* § 29-1-2-1(a), (b).

[24]"Net estate" is defined as "the real and personal property of a decedent exclusive of homestead rights, the widow's and family allowance and enforceable claims against the estate." *Id.* § 29-1-1-3. Presumably, the survivor's allowance is a claim against the estate. *See* note 14 *supra*. If so, then clearly the elective share is not computed until after the spouse's survivor's allowance claim has been deducted from the total estate. If the survivor's allowance is not a claim, or until the legislators do some housekeeping and replace the obsolete language referring to homestead rights and the widow's and family allowances with language referring to the survivor's allowance, the specific language of the survivor's allowance provision must alone be relied upon to indicate that the survivor's allowance may be claimed in addition to the elective share. The survivor's allowance statute provides: "An allowance under this section is not

The spouse's elective share is a nonbarrable interest. Any spouse who is dissatisfied with the provisions made in the deceased spouse's will may assert the status of a forced heir without regard to whether the spouse is, in fact, in need of the protection afforded and without regard to whether the spouse has, in fact, received the equivalent of, or more than, the elective share by extra-testamentary means. A decedent, who has generously shared the family wealth with the spouse by inter vivos transfers and arrangements, may intend that the assets remaining in his or her estate at death pass to persons other than his or her spouse. The decedent may attempt in the will to force the spouse to elect between taking under the will and retaining inter vivos benefits,[25] but if the spouse elects against the will, the will provisions will not operate to reduce the statutory share. In effect, the spouse renounces the will and takes as if the decedent died intestate.[26] Conversely, although the elective share is nonbarrable in the sense that the decedent may not prevent the spouse from taking one-third of the net estate, the electing spouse is not assured that the interest will be of any value. If there are no assets in the estate, the elective share will afford the spouse no protection against actual disinheritance.

The elective share statute expresses the legislature's lack of concern about the possibility that the estate-based elective share may overprotect or underprotect the surviving spouse: "In determining the net estate of a deceased spouse for the purpose of computing the amount due the surviving spouse electing to take against the will, the court shall consider only such property as would have passed under the laws of descent and distribution."[27] Overprotection

---

chargeable against the distributive shares of either the surviving spouse or the children." IND. CODE § 29-1-4-1 (Supp. 1978). Unfortunately, the issue is complicated by the broad language of section 29-1-3-1(c): "In electing to take against the will, the surviving spouse is deemed to renounce all rights and interest of every kind and character in the personal and real property of the deceased spouse, and to accept such elected award in lieu thereof."

[25]*See, e.g.*, Young v. Biehl, 166 Ind. 357, 77 N.E. 406, (1906), wherein the decedent owned one parcel of land in fee and another with his wife as tenants by the entirety. The decedent devised both parcels to his wife for life, remainder to his children. The wife did not elect to take against the will. The court stated:

> It is well settled that where it is reasonably clear that the provisions of a will were intended to be in lieu of the widow's interest in her husband's estate under the law, she cannot have the benefit of both, and by the acceptance of one she waives all right to the other.

Id. at 359, 77 N.E. at 406 (citations omitted).

[26]IND. CODE § 29-1-3-1(c), (d) (1976). Detrimental as well as beneficial will provisions are inoperative insofar as the electing spouse is concerned. *See* Salvation Army, Inc. v. Hart, 239 Ind. 1, 13-14, 154 N.E.2d 487, 493 (1958).

[27]IND. CODE § 29-1-3-1(a) (1976).

is clearly sanctioned. The comments to this section state that the quoted paragraph

> was inserted in order to make clear that real estate held jointly by entireties, joint bank accounts, income from inter vivos trusts, etc., are not to be considered in computing the amount due the surviving spouse. The surviving spouse takes such jointly held property by virtue of contract and not by virtue of the laws of descent and distribution.[28]

Underprotection is clearly not prevented. The only property that passes by the laws of descent and distribution is property that the decedent owns at death. The legislative policy is: "[I]f a man or woman retains ownership of his or her property until death, then a portion of it must be shared with the surviving spouse."[29] Legislative policy, however, does not require that the decedent retain ownership of any property until death. In fact, a decedent may retain a substantial interest in, or substantial control over, property that will not be included in his or her estate. A decedent may in substance "own" property that is not required to be shared with the surviving spouse.

3. Creditor Protection for Widows.—Indiana Code section 29-1-2-2(a) provides:

> Any interest acquired by a widow in the decedent's real estate, including contracts for the purchase of real estate, whether by descent or devise, not exceeding one-third (1/3) of said decedent's real estate, shall be received by her, free from all demands of creditors: Provided, however, that where the real estate exceeds in value ten thousand dollars ($10,000), the widow shall have one-fourth (1/4) only and where the real estate exceeds twenty thousand dollars ($20,000) one-fifth (1/5) only, as against creditors.[30]

---

[28]IND. CODE ANN. § 29-1-3-1, Commission Comments at 86 (Burns 1972). *See* the explanation of the term "overprotection" in note 2 *supra*.

[29]Leazenby v. Clinton County Bank & Trust Co., 355 N.E.2d 861, 867 (Ind. Ct. App. 1976).

[30]IND. CODE § 29-1-2-2(a) (1976). This section is the last vestige of statutory dower in Indiana. Taken literally, the language is unworkable when applied to an intestate or an elective share acquired by the widow. Both the intestate succession and the elective share provisions state that the spouse's distributive share is a portion of the decedent's net estate, which is the decedent's real and personal property exclusive of enforceable creditor's claims. *Id.* §§ 29-1-1-3, -2-1, -3-1 (1976). Section 29-1-2-2 protects from creditor's claims only the "interest acquired by a widow in the decedent's real estate." The literal language of section 29-1-2-2, thus, results in a "Catch 22." However, because section 29-1-2-2 states that the interest acquired "whether by descent or devise" is protected, it must be construed to have some effect when applied to the

This section gives widows[31] some protection against claims of creditors, although the full one-third elective share will rarely be entirely protected. The statute protects the widow's acquired interest in decedent's real estate only, not in personalty, and only the full one-third interest in the real estate to the extent that its value does not exceed $10,000. Another limitation upon the protection afforded is the fact that "[t]he interest of a purchase-money mortgagee, of a mortgagee under a mortgage executed prior to the marriage, or of a person holding a mortgage in which said widow has joined, shall take precedence over the interest of the widow."[32]

4. Protective Provisions and Waiver.—The spouse may waive his or her statutory right to a share of the decedent's estate. The requirements for an effective contractual waiver are codified; the waiver must be in writing, after "full disclosure of the nature and extent of such right," and is binding only "if the thing or promise given . . . is a fair consideration under all the circumstances."[33]

There are statutory provisions precluding a taking by an undeserving spouse. Any person who has been legally convicted of "murder, causing suicide, or voluntary manslaughter shall . . . become a constructive trustee of any property acquired by him from the decedent or his estate because of the offense, for the sole use and benefit of those persons legally entitled thereto other than such guilty person . . . ."[34] If one spouse has left the other and is living in adultery at the time of the other spouse's death, the adulterous

---

widow of an intestate decedent who takes "by descent." *See generally* G. HENRY, THE PROBATE LAW AND PRACTICE OF THE STATE OF INDIANA 1536-39 (6th ed. J. Grimes 1954); *id.* at 252-59 (Supp. 1977).

[31]IND. CODE § 29-1-1-3 (1976) provides that "the masculine gender includes the feminine and neuter." However, there is no provision that the feminine includes the masculine.

[32]*Id.* § 29-1-2-2(b).

[33]IND. CODE §§ 29-1-2-13, -3-6 (1976). Both sections are to be read together. IND. CODE ANN. § 29-1-2-13 Commission Comments (Burns 1972).

[34]IND. CODE § 29-1-2-12 (Supp. 1978). Under a prior version of this statute, which provided: "[N]o person who unlawfully causes the death of another and shall have been convicted thereof . . . shall take by devise or descent any part of the property, real or personal, owned by the decedent at the time of his or her death," Act of Mar. 2, 1907, ch. 95, § 1, 1907 Ind. Acts 136, (current version at IND. CODE § 29-1-2-12 (Supp. 1978)); it was held that a widow convicted of causing the death of her husband was not, by the statute, deprived of her right to claim a widow's allowance because the statutory widow's allowance, being a preferred claim, did not pass by devise or descent. *In re* Estate of Mertes, 181 Ind. 478, 104 N.E. 753 (1914). Under the present version of the statute, however, it seems that a person convicted of murdering his or her spouse would be denied the survivor's allowance because the allowance is acquired from the decedent's estate because of the offense. *See also* National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957) (murderer becomes constructive trustee of victim's one-half tenancy by the entirety interest).

spouse "shall take no part of the estate of the deceased husband or wife."[35] If one spouse has abandoned the other "without just cause, he or she shall take no part in his or her estate."[36]

B. Leazenby and Its Implications

With one exception, the only source of funds available to satisfy the statutory allowance and the elective share is the estate of the decedent.[37] Before the decedent's death, neither the elective share nor the survivor's allowance is a vested interest. Each is "only an expectant interest, determined at the time of death, and dependent upon the contingency that the property to which the interest attaches becomes part of the decedent's estate."[38] Property will not become a part of the decedent's estate if the decedent made a valid inter vivos gratuitous transfer of that property.[39] For purposes of this discussion, gratuitous inter vivos transfers are divided into two categories: (1) Absolute transfers, where the transferor retains no control over, or interest in, the subject matter of the transfer; and (2) non-absolute transfers, where the transferor retains some control over, or interest in, the transferred property. In the former category would be, for example, an inter vivos gift by which the transferor divests himself of all interest in and control over the subject matter of the gift or a transfer into an irrevocable trust in which the transferor-settlor is neither a beneficiary nor a trustee. In the latter category, the types of transfers may be arranged on a continuum, depending on the degree of control or the extent of the interest retained by the transferor. At one end of the continuum, the closest to the absolute transfer category, would be a transfer into an irrevocable trust in which the transferor retains a defined and limited interest, for example, the right to the income for life. The settlor-transferor might even be the trustee or co-trustee.[40] Pro-

---

[35]IND. CODE § 29-1-2-14 (1976).

[36]*Id.* § 29-1-2-15.

[37]The exception is discussed in text accompanying notes 86-92 *infra*.

[38]Leazenby v. Clinton County Bank & Trust Co., 355 N.E.2d 861, 863 (Ind. Ct. App. 1976).

[39]Only to the extent that a transfer is gratuitous will the transfer remove value from the decedent's estate. If the transfer is for consideration, to the extent that the consideration is paid to the transferor and reflects the fair value of the property, no value is removed from the transferor's estate. Only the character of the property changes.

[40]*See generally* 1 A. SCOTT, THE LAW OF TRUSTS § 57.6, at 517-18 (3d ed. 1967) wherein the author states:

> The owner of property may create a trust not only by transferring the property to another person as trustee, but also by declaring himself trustee. Such a declaration of trust, although gratuitous, is valid. . . . Suppose, however, that the settlor reserves not only a beneficial life interest but also a power of

gressing across the continuum toward the category of no transfer would be a transfer of a remainder interest following the transferor's retained life estate; a transfer into a revocable trust, with or without a right in the transferor to income or principal, or with or without a right in the transferor to control the trustee; a transfer into a bank account in the joint names of the transferor and another; a transfer into a trust account with the transferor as trustee for another—the so-called Totten trust; and a gift causa mortis.[41] When gratuitous transfers are made to third parties other than the transferor's spouse, the greater the control reserved and the interest retained by the transferor, the more suspect the transaction becomes when viewed from the eyes of the spouse who is entitled to a forced share of the assets decedent owns at death. The more control the transferor retains until death, the more it looks as if he or she owns the property at death and should share it with his or her spouse.

In other jurisdictions where the spouse's statutory elective share is a share of the deceased spouse's estate, courts have attempted to counteract the underprotective inadequacies of the legislative scheme. In response to a variety of arguments made by underprotected spouses, many courts have set aside the decedent's otherwise valid inter vivos transfers to the extent necessary to satisfy the spouse's elective claim if the transfers were, by various tests, "colorable,"[42]

---

revocation. Such a trust is not necessarily testamentary. The declaration of trust immediately creates an equitable interest in the beneficiaries, although the enjoyment of the interest is postponed until the death of the settlor, and although the interest may be divested by the exercise of the power of revocation. The disposition is not essentially different from that which is made where the settlor transfers the property to another person as trustee. It is true that where the settlor declares himself trustee he controls the administration of the trust. As has been stated, if the settlor transfers property upon trust and reserves not only a power of revocation but also power to control the administration of the trust, the trust may be held to be testamentary. There is this difference, however: the power of control which the settlor has as trustee is not an irresponsible power and can be exercised only in accordance with the terms of the trust.

See also, e.g., Farkas v. Williams, 5 Ill. 2d 417, 432, 125 N.E.2d 600, 608 (1955) (power reserved to settlor as trustee not as great as power reserved to settlor as settlor, because "as trustee he must so conduct himself in accordance with standards applicable to trustees generally").

[41]This list does not purport to be exhaustive. The varieties of non-absolute transfers are limited only by the imagination of the transaction's draftsmen.

[42]"Colorable" has been used to mean many things:

> It has been used to connote shams; it may signify 'real' transfers that are made without the knowledge of the surviving spouse; it may be a synonym for 'illusory,' as used with reference to 'real' transfers in which the decedent retained undue control, or merely the power to revoke; and offtimes [*sic*] it is tossed in for make weight effect, with no ascertainable meaning—a bit of harmless garbage from the law digests.

"illusory,"[43] or "in fraud of"[44] or made with the "intent to defeat"[45] the spouse's statutory share.[46] The Indiana Court of Appeals, in *Leazenby v. Clinton County Bank & Trust Co.*,[47] was asked by a surviving spouse to apply one or more of these tests to set aside an inter vivos trust into which the deceased spouse had transferred all her property. In *Leazenby*, however, the surviving spouse did not prevail. A review of the *Leazenby* decision, its ramifications upon the question of what types of absolute and non-absolute transfers will withstand attack by deprived surviving

---

W. MACDONALD, FRAUD ON THE WIDOW'S SHARE 132-33 (1960) (footnotes omitted). *See, e.g.*, Thuet v. Thuet, 128 Colo. 54, 260 P.2d 604 (1953); Blevins v. Pittman, 189 Ga. 789, 7 S.E.2d 662 (1940); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Osborn v. Osborn, 102 Kan. 890, 172 P. 23 (1918); Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1945); *In re* Halpern, 303 N.Y. 33, 37, 100 N.E.2d 120, 122 (1951); Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926). Macdonald cites Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913), as an example of the use of the term "colorable" for make weight effect. In *Ramsey* the court held: "[The] donor who makes a gift causa mortis remains siesed or possessed of the property until death within the meaning of a statute giving dower in personal property of which he dies seised." *Id.* at 70, 100 N.E. at 1060. The gift was described as "colorably absolute." *Id.* at 71, 100 N.E. at 1061. *See generally* W. MACDONALD, *supra*, at 120-44; *see also* Stroup v. Stroup, 140 Ind. 179, 189, 39 N.E. 864, 867 (1895) (dicta) (husband secured a conveyance "to be made but colorably to another").

[43]The illusory transfer test is a test based on the transferor's retention of control over the transferred property. *E.g.*, Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937) (discussed in text accompanying notes 58-61 *infra*); Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973) (Totten trust); Smith v. Northern Trust Co., 322 Ill. App. 168, 54 N.E.2d 75 (1944); Hayes v. Lindquist, 22 Ohio App. 58, 153 N.E. 269 (1926). *See generally* W. MACDONALD, *supra* note 42, at 67-97; *see also* Land v. Marshall, 426 S.W.2d 841 (Tex. 1968) (illusory trust doctrine applied in community property jurisdiction).

[44]*E.g.*, Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611 (1939) (statute speaks of fraud); *In re* Sides' Estate, 119 Neb. 314, 228 N.W. 619 (1930); *In re* Rynier's Estate, 347 Pa. 471, 32 A.2d 736 (1943). *See generally* MACDONALD, *supra* note 42, at 98-119. Both Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1895), and Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913), speak of fraud on marital rights. *See* note 67 *infra*.

[45]*E.g.*, Mushaw v. Mushaw, 183 Md. 511, 39 A.2d 465 (1944); Jaworski v. Wisniewski, 149 Md. 109, 131 A. 40 (1925); Malone v. Walsh, 315 Mass. 484, 53 N.E.2d 126 (1944); Brewer v. Connell, 30 Tenn. 500 (1851); *In re* Hummel's Estate, 161 Pa. 215, 28 A. 1113 (1894). *See generally* W. MACDONALD, *supra* note 42, at 98-119.

[46]"Sham" is another term that might be used as a reason for setting aside a transaction in favor of the surviving spouse's claim. If, however, a transaction is a sham, it is a contradiction in terms to say that the transaction was otherwise valid. A "sham" transfer does not involve the requisite donative intent. Often courts use other terms, such as colorable, fraudulent, or illusory, to indicate that the purported transfer was, in fact, a sham—that is, no transfer at all. *See generally* W. MACDONALD, *supra* note 42, at 132-33, 136, 190, 210.

[47]355 N.E.2d 861 (Ind. Ct. App. 1976).

spouses, and the propriety of the court's interpretation of the intent of the Indiana legislature will conclude the discussion of the present state of law and policy in Indiana.

In *Leazenby*, a surviving husband was completely disinherited by his spouse. Three years before her death, Elsie Leazenby established a revocable inter vivos trust by the terms of which she retained, in addition to the power to revoke, the right to the income for life. She gave the trustee, Clinton County Bank and Trust Company, the discretionary power to "expend the income or corpus for her 'care, use, maintenance, and/or benefit,' "[48] but she retained some power to control the trustee in the exercise of its discretion.[49] The remainder beneficiaries of the trust were Elsie's children, a grandchild, and her husband, Cloyd, who was given only the right to reside in Elsie's home for six months after her death.[50]

Before her death, Elsie transferred all of her property into the trust. By her will, she made no provision for Cloyd, but directed that any property remaining in her estate be added to the trust. Cloyd was dissatisfied with the will provisions, but, because there were no assets in Elsie's estate, his elective right to take against the will consisted of a right to take one-third of nothing.[51] Thus, the case presented a perfect example of the underprotective potential of an estate-based protective scheme.

Cloyd argued that the trust should be set aside on the grounds that it was "colorable and illusory and a fraud upon him because it defeated his statutory [elective] right to share in his spouse's estate."[52] The trial court found, however, that Elsie's trust "was a valid inter vivos trust which acquired title to all of decedent's property . . . whereby the same is not subject to administration in her estate" and, therefore, not subject to Cloyd's elective claim.[53] The

---

[48]*Id.* at 862.

[49]The provision by which Elsie retained control over the trustee was broadly worded: "It is the intent of the parties that this trust be run as a convenience for the Settlor, and that the Trustee, in the absence of directions from Settlor, may exercise the broad discretion given it herein." *Id.*

[50]*Id.* Cloyd and Elsie had both been married before, and throughout their marriage they kept their accounts separately.

[51]Actually, Cloyd was a second childless spouse, and his elective share would have been one-third of Elsie's net personal estate and a life estate in one-third of Elsie's lands. IND. CODE § 29-1-3-1(a) (1976) (quoted in text at note 22 *supra*).

[52]355 N.E.2d at 863. It is irrelevant whether Cloyd asked that the trust be set aside only to the extent necessary to satisfy his elective share or for all purposes, in which case the excess over the amount needed to satisfy Cloyd's elective share would pass to the trust by the terms of Elsie's will.

[53]*Id.*

administrator of Cloyd's estate appealed the adverse ruling on the ground that it was contrary to the law and the evidence.[54]

The appellate court recognized that the question raised in the appeal—that is, to what extent may a transferor retain control over or an interest in property transferred inter vivos and nonetheless deprive his or her surviving spouse of a statutory elective share of the property—involved "a conflict between two public policy considerations, one of which favors a provision for support of a surviving spouse in case of disinheritance by the deceased spouse, and the other which favors unfettered inter vivos alienability of one's real or personal property."[55] The court concluded that legislative intent is to strike a balance in favor of the policy of unfettered alienability even though, as a consequence, the elective share may not accurately reflect the extent of property actually controlled by the decedent at death. The elective share statute clearly provides that, in computing the elective share, "the court shall consider only such property as would have passed under the laws of descent and distribution."[56] If the transferor established a valid inter vivos trust, the assets in the trust would not pass by the laws of descent and distribution and would not be available to satisfy the elective claim of the transferor's surviving spouse.

The *Leazenby* court chose not to follow the lead of other courts that have examined the substance of, or the motive for, otherwise valid inter vivos transfers to determine if the surviving spouse is equitably entitled to an elective share of the transferred property. In some states, an otherwise valid inter vivos trust may be invalid as against the settlor's electing spouse if the settlor retains too much dominion and control over the trust.[57] In the leading case, *Newman v. Dore*,[58] three days before his death, a husband-settlor transferred all his property into an inter vivos trust in which his widow was given no beneficial interest. The settlor retained the power to revoke and the right to the income for life; in addition, the powers granted to the trustees were "subject to the settlor's control during his life," and could be exercised "in such manner only as the

---

[54]*Id.* Cloyd died on February 27, 1974, after he had filed his petition to set aside the trust and his election to take against the will. Although the right to elect is personal and cannot be exercised subsequent to the spouse's death, IND. CODE § 29-1-3-4 (1976), once the right is exercised, nothing precludes prosecution of the right by the electing spouse's personal representative.

[55]355 N.E.2d at 863.

[56]IND. CODE § 29-1-3-1(a) (1976).

[57]*See* authorities cited at note 43 *supra*.

[58]275 N.Y. 371, 9 N.E.2d 966 (1937) (changed by statute). See the discussion of New York's statutory scheme at notes 127-34 *infra* and accompanying text.

settlor shall from time to time direct in writing."[59] The *Newman* court, assuming without deciding that the trust would be valid except for the existence of the surviving spouse's elective right, stated the so-called illusory transfer test: whether the spouse has "in good faith divested himself of ownership of his property or has made an illusory transfer."[60] The apparent rationale for the illusory transfer test is that, if a spouse in substance "owns," controls and enjoys his or her property until death, there is a moral obligation to let the survivor share.[61]

Other courts have purportedly focused on the decedent's motive or intent in making the inter vivos transfer.[62] In motive jurisdictions, one finds such statements as:

> The general rule of law . . . is that a conveyance of property by the husband without consideration and with the intent and purpose to defeat his widow's marital rights in his property, is a fraud upon such widow and she may sue in her own right, and set aside such fraudulent conveyance, and recover the property so fraudulently transferred, to the extent of her interest therein.[63]

A few courts do not limit themselves to a single test, but look at all the circumstances surrounding the transaction to determine its fairness, including

> the completeness of the transfer and the extent of control retained by the transferor, the motive of the transferor, par-

---

[59]*Id.* at 377, 9 N.E.2d at 968.

[60]*Id.* at 379, 9 N.E.2d at 969.

[61]W. MACDONALD, *supra* note 42, at 87-88 (footnotes omitted), states:

> The illusory transfer test, based on excessive control, is not without merit. The widow's concern is with testamentary transfers, since the election statutes restrict her to the property comprising the decedent's estate. Testamentary transfers are tested in terms of control. On this criterion, if the widow is to be permitted to reach other than testamentary transfers, it would have to be transfers which are quasi-testamentary, i.e., in which an unreasonable (albeit not such as to require the "testamentary" label) degree of control was retained. The reason is simple: if a husband in substance enjoys and "owns" his property until he dies, he is under a moral if not a legal obligation to let the widow share. Put in other words, if the widow can participate in that property which the husband owned "in the eyes of the law," so should she be entitled to that which he owned in substance, or the eyes of the law should be opened wider.

[62]*See* authorities cited in notes 44 & 45 *supra.*

[63]Merz v. Tower Grove Bank & Trust Co., 344 Mo. 1150, 130 S.W.2d 611, 617 (1939). The Missouri statute, MO. ANN. STAT. § 474.150 (1955), provided that any gift "in fraud of the marital rights" of the transferor's surviving spouse may be recovered from the donee and applied to the payment of the spouse's elective share. A conveyance of real estate without the express assent of the spouse was by this statute presumptively in fraud of the spouse's marital rights. *See* notes 153-55 *infra* and accompanying text.

> ticipation by the transferee in the alleged fraud and the degree to which the surviving spouse is stripped of his or her interest in the estate of the decedent spouse . . . [and] several other factors . . . , such as the relative moral claims of the surviving spouse and of the transferees, other provisions for the surviving spouse, whether or not he or she has independent means and the interval of time between the transfer and the death of the transferor.[64]

The *Leazenby* court specifically rejected the illusory transfer test as being so vague and uncertain as to impose "a hardship on conscientious settlors and beneficiaries who cannot be certain which good faith arrangements will be upheld."[65] Although the court did not discuss the last-mentioned general fairness test, it obviously would have rejected such a test on the grounds of vagueness and uncertainty.[66] Even though the idea of fraud on marital rights has been mentioned before in Indiana cases,[67] the *Leazenby* court re-

---

[64]Whittington v. Whittington, 205 Md. 1, 12, 106 A.2d 72, 77 (1954) (Totten trust).

[65]355 N.E.2d at 864. Others disagree. *See, e.g.*, Montgomery v. Michaels, 54 Ill. 2d 532, 301 N.E.2d 465 (1973); Land v. Marshall, 426 S.W.2d 841 (Tex. 1968). *See generally* W. MACDONALD, *supra* note 42, at 87-88 (quoted at note 61 *supra*).

[66]Even though the general fairness test is commendable because it requires the court to examine all the equities, it involves the greatest uncertainty for donors and donees because a case-by-case determination is essential. While under the illusory transfer test, the transferor could be certain that a transfer into a revocable trust with a retained life estate, but no power to control the trustee, would be upheld against the claim of the spouse, even this certainty is lost under the general fairness test.

[67]In Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1895), Daniel Stroup paid the entire consideration for a conveyance of real property by a deed in which a trust was established. The court held that, because the trustee possessed only a nominal title and no interest was created in anyone other than Stroup, the deed was in essence a direct conveyance to Stroup. Thus, Stroup was seised of real property to which his wife's dower interest attached. In dicta, the court stated:

> [W]e may add that while the authorities are in conflict, the weight of authority is certainly in support of the conclusion that where the husband, intending to defeat the claim of his wife to dower, secures a conveyance of lands, purchased by him, to be made but colorably to another, and securing to himself the full use, control and disposition of the property, such conveyance is fraudulent as against the wife, and she may, before or after his death, recover that part of the lands which, under the law, would have fallen to her in case the conveyance had been to her husband instead of by the colorable device which held the actual seizin from him.

Id. at 189-90, 39 N.E. at 867-68. *See also* Kratli v. Booth, 99 Ind. App. 178, 191 N.E. 180 (1934) (wife's execution of a deed procured by fraud practiced upon her by her husband); Schmeling v. Esch, 84 Ind. App. 247, 147 N.E. 734 (1925) (in divorce action, the wife may contest as fraudulent a conveyance made by the husband with intent to place the property beyond her reach); Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913) (husband's gift of personal property made in expectation of death and with intent to defeat widow's dower intent is fraudulent as to widow and is subject to her dower claim).

jected the fraud/intent/motive tests. The court stated that the phrase "fraud on the marital rights" is "so often used in a manner devoid of meaning that it presents an unsatisfactory test."[68] If a spouse has no interest in the decedent's property during the decedent's lifetime, then a valid trust agreement dealing with that property "could not be fraudulent, actually or constructively, as to [that spouse]. 'One cannot be defrauded of that to which he has no right.' "[69] The *Leazenby* court concluded: "[T]he legislation granting an elective share . . . [proscribes] only dispositions of a testamentary character which disinherit a surviving spouse."[70]

The trial court had found that Elsie's trust was a valid, nontestamentary inter vivos disposition and, therefore, was not subject to Cloyd's elective claim. The appellate court affirmed the trial court's judgment after reviewing the facts of the case in light of circumstances that might have rendered the trust invalid. The only provision that brought the validity of Elsie's trust into question was a provision describing Elsie's retained control over the trustee. The trust provided that "the Trustee, in the absence of directions from [the] Settlor, may exercise the broad discretion given it herein."[71]

Elsie's retained control might have rendered the trust invalid in two separate but related ways. First, if Elsie's control over the disposition and management of the trust property was so great that the trustee possessed only a nominal title, with "neither a power nor a duty related to the administration of the trust," then, by statute, the "title to the trust property will be treated as having vested directly in the beneficiary on the date of delivery to the trustee."[72] If the trust had failed on this ground, title to the trust property would have remained vested in Elsie, the beneficiary of

---

[68]355 N.E.2d at 864, (citing Power, *The Law and the Surviving Spouse: A Comparative Study*, 39 IND. L.J. 262, 263 n.6 (1964)).

[69]355 N.E.2d at 865, (quoting from Cherniack v. Home Nat'l Bank & Trust Co. of Meriden, 151 Conn. 367, 371, 198 A.2d 58, 60 (1964)). *Accord, e.g.*, Ellis v. Jones, 73 Colo. 516, 216 P. 257 (1923). Other objections are that intent is difficult to prove after the transferor is dead, that the test involves too much uncertainty for donors and donees, and that in fact the actual intent to avoid the spouse's share may arise from a praiseworthy motive, for example, an intent to benefit the donor's children by a previous marriage. *See* W. MACDONALD, *supra* note 42, at 117-19.

[70]355 N.E.2d at 865.

[71]*Id.* at 862. The entire control paragraph is reprinted at note 49 *supra*. The phrase that the trust was to be "run as a convenience for the Settlor" was construed by the court to mean that it would be a convenience for Elsie not to be bothered with management of the trust property. The court did not read the phrase to mean that "the trust be run *at* the convenience *of* the Settlor." *Id.* at 866.

[72]IND. CODE § 30-4-2-9 (1976) which is subject to the exception stated in §§ 30-4-2-13 for passive land trusts.

the trust, despite the delivery of the property to the trustee. On her death, Elsie would have been the owner of the trust property, and the property would have been in her estate, subject to Cloyd's elective claim.

Second, and similarly, Elsie's retention of control over the trustee may have been so great as to render the trustee merely her agent. According to the *Restatement (Second) of Trusts*, quoted with approval by the *Leazenby* court,

> where the owner of property delivers possession of it to a person as his agent directing him to deliver the property to a third person on the owner's death, a mere agency is created which terminates on the death of the principal. The disposition in favor of the third person is testamentary and invalid unless the requirements of the Statute of Wills are complied with.[73]

If Elsie's trustee were merely her agent, then Cloyd's elective right would extend to the property remaining in the possession of the trustee at Elsie's death, whether or not there was compliance with the requirements of the Statute of Wills.[74]

The *Restatement* provides that a trustee is not an agent of the settlor "merely because the settlor reserves a beneficial life interest or because he reserves in addition a power to revoke the trust in whole or in part, and a power to modify the trust, and a power to control the trustee as to the administration of the trust."[75] Whether the settlor has retained more than the permissible power to control the trustee regarding administrative details is not an easy question to answer in many cases. The settlor's intent is the primary consideration. If the settlor intended to give the trustee title to the trust property and intended to create interests in the third-party beneficiaries of the trust upon delivery to the trustee, then the trustee is not merely the settlor's agent and the disposition in favor of the third parties is not testamentary.[76]

---

[73]RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959), *quoted in* Leazenby v. Clinton County Bank & Trust Co., 355 N.E.2d at 864.

[74]If the requirements of the Statute of Wills, IND. CODE § 29-1-5-3 (1976), had not been met, then the attempted testamentary transfer to the third party beneficiaries would have been ineffective to divest Elsie of ownership of the property. If the requirements of the Statute of Wills had been met, then Cloyd could have elected against the testamentary transfer because he could have elected against the provisions of any validly executed will.

[75]RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959).

[76]Even the *Restatement* descriptions of the distinctions between an agent and a trustee are filled with conclusory statements. *E.g.*, "A trustee has title to the trust property; an agent as such does not have title to the property of his principal,

The *Leazenby* court struggled, but only slightly, with the potential breadth of Elsie's retained control. The court concluded that Elsie intended to create "vested beneficial interests in her daughters, granddaughter, and husband, [and] that she intended to transfer the legal title to her property to the trustee."[77] Despite the unfortunately broad language of the problematical trust provision, the court concluded that Elsie's conduct after the creation of the trust indicated that she did not intend to retain excessive control over the trustee.[78] She never exercised her power to direct the trustee and she never "acted in any manner that would be inconsistent with, or divest the remainder beneficiaries of, their interests."[79] Thus, given the trial court's conclusion that the trust was valid, and given a policy that favors construction of a trust to uphold its validity,[80] the appellate court could not state that the judgment of the trial court was clearly erroneous.

Although it is impossible to determine how much the *Leazenby* court was affected by the equities of the case, it should be pointed out that the court was not confronted with an equitably difficult underprotection situation. Cloyd and Elsie had both been married before and had kept their pre-marital property interests separate. The remainder beneficiaries of Elsie's trust were her own children and grandchild, the natural objects of her bounty. In a sense, Cloyd benefited from the trust because the trust paid for Elsie's nursing home care and medical bills. Cloyd, apparently, was not left desti-

---

although he may have powers with respect to it"; An agent undertakes to act on behalf of his principal and subject to his control . . . ; a trustee as such is not subject to the control of the beneficiary . . . ." *Id.* § 8, Comments a & b. In Stroup v. Stroup, 140 Ind. 179, 187, 39 N.E. 864, 867 (1895), the court stated, in discussing whether or not a deed was testamentary: "[T]he pivotal question is the intention of the grantor. If to postpone title and enjoyment until after his death, it is testamentary; if to confer title and postpone the enjoyment thereof, it is a deed." On the characteristics of a testamentary transaction, *see* Ritchie, *What is a Will?*, 49 VA. L. REV. 759 (1963). The amount of control that may be retained by transferor without running the risk of testamentary classification depends on the type of transfer. For example, the settlor of a trust may reserve a power to revoke the trust without the risk of testamentary classification, RESTATEMENT (SECOND) OF TRUSTS, § 57 (1959), while the grantor under a deed runs a greater risk if he or she reserves a power to revoke the deed. *See* Garvey, *Gifts of Legal Interests in Land*, 54 KY. L.J. 19 (1965).

[77]*Id.* at 866. It is not necessary that the settlor intend to create vested interests in the beneficiaries in order to avoid testamentary characterization. It is only necessary that the settlor intend to presently create an interest in the beneficiaries, whether a vested or a contingent interest.

[78]*Id.* at 866 (citing 2 A. SCOTT, THE LAW OF TRUSTS, § 164.1 (3d ed. 1967), for the proposition that subsequent conduct is evidence of the settlor's intent at the creation of the trust).

[79]355 N.E.2d at 866.

[80]*Id.* (citing Warner v. Keiser, 93 Ind. App. 547, 177 N.E. 369 (1931)).

tute, without "a minimal means of sustenance," or "unable to provide his . . . own support."[81] The trust was created three years before Elsie's death.[82] There was no secret motive on Elsie's part to establish the trust in order to deprive Cloyd of wealth that he had helped accumulate.[83] Cloyd died soon after Elsie and would not have benefited if the trial court's decision had been reversed. Thus, the equities were not so clearly in Cloyd's favor as they might have been had Cloyd been left destitute by a substantial transfer three days before Elsie's death.

Leazenby involved a revocable inter vivos trust, which is only one of the several varieties of non-absolute transfers mentioned above. However, since *Leazenby* is the only appellate decision in Indiana in the last sixty-five years to discuss the relationship between a decedent's inter vivos transfers and his or her spouse's statutory right,[84] *Leazenby's* strict interpretation of legislative intent has important ramifications. *Leazenby*'s conclusion that inter vivos validity is the only test to be applied to determine if property transferred by the decedent must be shared with the decedent's surviving spouse is relevant in all inter vivos transfer situations. Under the *Leazenby* test, a surviving spouse has no claim to property completely and openly transferred by the decedent to third parties, whether the transfer was made three years, three months, or three days before the transferor's death.[85] As far as non-absolute transfers are concerned, *Leazenby* holds that any nontestamentary transfer would pass muster and by-pass the surviving spouse's claim.

Consider, for example, a non-absolute inter vivos transfer by the decedent into a bank account in the joint names of himself and

---

[81]355 N.E.2d at 867.

[82]*Id.* at 862. It is not clear, from the facts given, when the bulk of Elsie's property was transferred to the trust. The more contemporaneous the transfer and the decedent's death, it would seem that the more suspect is the decedent's intent, especially when the transfer is of a large portion of the decedent's estate. *But see* W. MACDONALD, *supra* note 42, at 149-54, noting that proximity of the transfer to the decedent's death does not seem to be determinative.

[83]355 N.E.2d at 866. The court pointed out that there was no conclusive evidence of a secreting of real ownership of Elsie's property, and no conclusive evidence that Cloyd did not know and approve of the trust. Cloyd must have been aware of the trust because the trust paid Elsie's nursing home and medical bills. However, why is Cloyd's awareness relevant if the test is whether or not the transfer was testamentary? Is the court suggesting that a secreting of ownership might call into play a different test for validity of the transfer? *See* note 94 *infra.*

[84]*See* Stroup v. Stroup, 140 Ind. 179, 39 N.E. 864 (1895); Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913).

[85]The only argument that the survivor might make to set aside an ostensibly absolute transfer is that there was, in fact, no intended transfer. For example, the spouse might argue that undue influence, mistake, duress, or a secret agreement between the transferor and the transferee negated an ostensibly donative intent.

another or into a Totten trust account in which the transferor is trustee for another. These transfers will avoid the surviving spouse's elective claim. This is clear from the *Leazenby* test read in conjunction with the recently enacted "Non-probate Transfers" statute, which establishes presumptions regarding inter vivos and after death ownership of the funds in such accounts.[86] In fact, a review of this statute supports *Leazenby*'s conclusion that legislative intent favors the policy of free alienability over a policy for support of surviving spouses from assets gratuitously transferred, but substantially controlled, by the decedent at death.

Section three of the "Non-probate Transfers" statute provides that, during the lifetime of the parties, a joint account[87] belongs to the parties in proportion to the net contributions by each, and a trust account[88] belongs beneficially to the trustee, unless there is clear and convincing evidence of a contrary intent.[89] Section four provides in part:

> (a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created. . . .
>
> . . . .
>
> (c) If the account is a trust account, on the death of the trustee or the survivor of two [2] or more trustees, any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a contrary intent . . . .[90]

---

[86]IND. CODE §§ 32-4-1.5-1 to 15 (1976 & Supp. 1978).

[87]A joint account is "an account payable on request to one [1] or more of two [2] or more parties whether or not mention is made of any right of survivorship." *Id.* § 32-4-1.5(4). A party is a "person who, by the terms of the account, has a present right, subject to request, to payment" from multiple party account. *Id.* § 32-4-1.5-1(7).

[88]A trust account is:

> [A]n account in the name of one [1] or more parties as trustees for one [1] or more beneficiaries where the relationship is established by the form of the account and the deposit agreement with the financial institution and there is no subject of the trust other than the sums on deposit in the account; it is not essential that payment to the beneficiary be mentioned in the deposit agreement. A trust account does not include a regular trust account under a testamentary trust or a trust agreement which has significance apart from the account, or a fiduciary account arising from a fiduciary relation such as attorney-client.

Id. § 32-4-1.5-1(14).

[89]*Id.* § 32-4-1.5-3(a), (c).

[90]*Id.* § 32-4-1.5-4.

Section six provides: "Any transfers resulting from the application of section 4 [32-4-1.5-4] are effective by reason of the account contracts involved and this chapter [32-4-1.5-1 to 32-4-1.5-15] and are not to be considered as testamentary or subject to Indiana Code title 29 [29-1-1-1 to 29-2-18-2]."[91] Section seven, however, provides in part: "No multiple-party account is effective against an estate of a deceased party to transfer to a survivor sums needed to pay claims, taxes, and expenses of administration, *including the statutory allowance to the surviving spouse* or dependent children, if other assets of the estate are insufficient."[92] Thus, by statute, joint bank accounts and Totten trusts are not testamentary, and, further, by statute, they are not to be considered a part of the decedent's estate except as necessary to satisfy claims of decedent's creditors or the survivor's allowance claim.

Although the Indiana legislature has provided a statutory elective share to protect surviving spouses from disinheritance, both the legislature and the courts, at present, allow a spouse to retain substantial inter vivos ownership rights over transferred assets and avoid a forced sharing of those assets with a surviving spouse at death.[93] Indiana law does not permit a court to view the substance of an otherwise valid inter vivos transaction to determine whether a surviving spouse is morally or equitably entitled to a share of the transferred assets at the transferor's death.[94] Neither may a court

---

[91]*Id.* § 32-4-1.5-6.

[92]*Id.* § 32-4-1.5-7 (emphasis added).

[93]*See id.* §§ 32-4-1.5-3, -4, -6, -7.

[94]Even a gift causa mortis, the lowest on the continuum of non-absolute transfers mentioned above because it is, perhaps, the most testamentary in appearance and effect, may avoid the survivor's allowance and spouse's elective claims in Indiana. In Crawfordsville Trust Co. v. Ramsey, 55 Ind. App. 40, 100 N.E. 1049 (1913), the court held that a gift causa mortis, made with an intent to defeat the donor's wife's dower interest in the transferred property, was nonetheless subject to the wife's dower claim. However, the court apparently did not consider a gift causa mortis to be testamentary. The court stated: "But whether said gift be held to be a gift causa mortis *or* testamentary in effect, it is clear under the authorities that, when made under the circumstances and conditions disclosed by the finding in this case it will not operate to defeat the widow's interest in the property so given." *Id.* at 71-72, 100 N.E. at 1061 (emphasis added). If a gift causa mortis is nontestamentary, then under the *Leazenby* test, the surviving spouse may not reach the subject matter of the gift to satisfy the elective share. Further, because the subject matter of the gift will not pass as part of the decedent's estate, the gift may not be reached to satisfy the spouse's survivor's allowance claim. It should be noted that a gift causa mortis is considered nontestamentary in the majority of jurisdictions, on the theory that an interest is created immediately in the transferee, subject to divestment by revocation of the gift. *See, e.g.*, McDonough v. Portland Sav. Bank, 136 Me. 71, 1 A.2d 768 (1938); Stradcutler v. Stradcutler, 151 Minn. 80, 185 N.W. 1016 (1921); Van Pelt v. King, 22 Ohio App. 295, 154 N.E. 163 (1926); *In re* White's Estate, 129 Wash. 544, 225 P. 415 (1924). *Contra, e.g.*,

question the survivor's need for a share of the decedent's estate. Underprotection and overprotection are both very real possibilities.

II. Statutory Protective Provisions in Other Jurisdictions

Various statutory schemes have been devised in other jurisdictions in an attempt to achieve some degree of equitable protection of the surviving spouse—that is, protection which takes into account inter vivos arrangements made by the decedent in favor of the spouse (to prevent overprotection) and protection which takes into account property transferred to others, but substantially controlled, by the decedent at death (to prevent underprotection). Some of the legislative attempts to counteract the underprotective and overprotective potentialities of the traditional estate-based protective scheme are far-reaching; others are more limited in scope and effect.

A. Statutory Allowances and Other Provisions

Nearly every statutory protective scheme includes some type of provision in which certain limited rights of the surviving spouse are equated with or made superior to the rights of unsecured creditors of the decedent. A homestead statute may protect a home or residence from creditors' claims.[95] Various types of personal property exemption statutes may enumerate specific items of exempt property[96] or set forth a value which the spouse may take in property or in cash.[97] Often family allowance provisions empower the court to authorize payments for the support of the spouse during administration of the decedent's estate.[98] The Uniform Probate Code's allowance and exempt property provisions are typical.

The Uniform Probate Code provides that the surviving spouse is entitled to: (1) A homestead allowance of $5,000;[99] (2) exempt prop-

---

McAdoo v. Dickson, 23 Tenn. App. 74, 126 S.W.2d 393 (1939). Another possible interpretation of *Ramsey*, however, is that the court was pronouncing a public policy that the surviving spouse's statutory dower claim may not be defeated by a transfer so tenuous as a gift causa mortis, especially one made with a questionable intent. *See* G. Henry, *supra* note 30, at 1481. *See also* Devol v. Dye, 123 Ind. 321, 24 N.E. 246 (1889) (gift causa mortis subject to deceased donor's debts). If so, arguably, the elective share and survivor's allowance provisions might be construed, despite *Leazenby's* broad language, to reflect this public policy when a case involving a gift causa mortis arises.

[95]*See, e.g.*, Fla. Stat. Ann. §§ 732.401, .4015 (West 1976).

[96]*See, e.g.*, Ga. Code Ann. §§ 51-1301, -1504 (Harrison 1974).

[97]*See, e.g.*, Pa. Stat. Ann. tit. 20, §§ 3121, 3122 (Purdon 1975).

[98]*See, e.g.*, Fla. Stat. Ann. § 732.403 (West 1976); Ill. Ann. Stat., ch. 110½, §§ 15-1, -2, -3 (Smith-Hurd 1978).

[99]Uniform Probate Code § 2-401 (1975 version) [hereinafter cited as UPC]. If there is no surviving spouse, the decedent's surviving minor and dependent children are entitled to divide the $5,000 allowance.

erty, consisting of household furniture, automobiles, furnishings, appliances, and personal effects, of a value not exceeding $3,500 in excess of security interests in the property, and the right to any deficiency from other assets of the estate;[100] and (3) a family allowance in any reasonable amount for maintenance during administration of the estate if the decedent was obligated to support the spouse.[101] The allowance and exempt property rights are cumulative and have priority over all claims against the estate.[102] A surviving spouse is entitled to the homestead allowance, exempt property, and the family allowance in addition to the spouse's intestate share, elective share, or share under the will.[103]

Generally, either by statute or by case law, a spouse may voluntarily waive any rights to share in the deceased spouse's estate.[104] Also, either by statute or by case law, an unworthy spouse may be denied a share of the decedent's estate.[105] Each of these provisions in a limited way, prevents underprotection or overprotection of surviv-

---

[100]UPC § 2-402. If there is no surviving spouse, the decedent's children are entitled jointly to the same value.

[101]UPC § 2-403. Minor children whom the decedent was, in fact, supporting are also entitled to the family allowance. The allowance may be paid in a lump sum or in periodic installments. *See also* UPC § 2-404.

[102]UPC §§ 2-401, -402, -403.

[103]UPC §§ 2-206, -401, -402, -403. By express provisions in the will, the testator may put the spouse to an election between devises under the will or benefits under the law. *See* UPC § 2-206, Commission Comments.

[104]Typical statutory provisions are, *e.g.*, DEL. CODE tit. 12, § 905 (Supp. 1977); IND. CODE §§ 29-1-2-13, -3-6 (1976) (discussed in text at note 33 *supra*); MD. EST. & TRUSTS CODE ANN. § 3-205 (1974); UPC § 2-204. Representative cases recognizing the enforceability of contractual arrangements whereby one spouse waives rights to share in the estate of the other spouse include, *e.g.*, *In re* Estate of Steven, 155 Colo. 1, 392 P.2d 286 (1964); Johnston v. Johnston, 134 Ind. App. 351, 184 N.E.2d 651 (1962); *In re* Estate of Pollack, 28 Ill. App. 3d 987, 329 N.E.2d 553 (1975).

[105]Statutory provisions may bar a person who intentionally kills another from taking a share of the slain person's estate. *E.g.*, CAL. PROB. CODE § 258 (West Supp. 1978); ILL. ANN. STAT. ch. 110½, § 2-6 (Smith-Hurd 1978); IND. CODE § 29-1-2-12 (1976) (discussed at note 34 *supra*); KAN. STAT. § 59-513 (1976); OHIO REV. CODE ANN. § 2105.19 (Page 1976); PA. STAT. ANN. tit. 20, §§ 2106(c), 2509(c) (Purdon 1975). In the absence of a statute, courts exercising equity jurisdiction may hold the slayer to be a constructive trustee of any property he acquires from the slain person or by reason of the offense. *See, e.g.* National City Bank v. Bledsoe, 237 Ind. 130, 144 N.E.2d 710 (1957); *In re* Estate of Mahoney, 126 Vt. 31, 220 A.2d 475 (1966). *See also* 5 A. SCOTT, TRUSTS §§ 492-492.6 (3d ed. 1967); RESTATEMENT OF RESTITUTION § 187 (1937). Marital misconduct, such as desertion or adultery, may bar a spouse from participation in the decedent's estate. *See, e.g.*, IND. CODE §§ 29-1-2-14, -15 (1976) (discussed at notes 35-36 *supra*); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2 (McKinney 1967); PA. STAT. ANN. tit. 20, §§ 2106(a), 2509(a) (Purdon Supp. 1978). The UPC takes the position that some definitive legal act, normally divorce, is necessary to bar the spouse's share. *See* UPC § 2-802 & Commission Comments.

ing spouses. The limited nature of the prevention is apparent from the fact that underprotection and overprotection are very possible in Indiana, as pointed out in Section I, despite the existence of the survivor's allowance, waiver, and unworthy spouse provisions. Because thoughtfully drafted elective share provisions have the greatest potential for guarding against both overprotection and underprotection, the remainder of the discussion of statutory protective schemes in other jurisdictions will focus on the provisions relating to the spouse's elective right.

B. Variations on the Elective Share Theme

The Uniform Probate Code's elective share provision is unique and the most far-reaching of all American statutory schemes. The surviving spouse is entitled to elect to take one-third of the decedent's augmented estate.[106] The basis of the augmented estate is the decedent's net estate.[107] The net estate is increased by the value of two categories of gratuitous transfers—transfers to third parties and transfers to the spouse. The value of property gratuitously transferred by the decedent during the marriage to persons other than the surviving spouse without the spouse's consent[108] is added to

---

[106]UPC § 2-201(a) provides: "[T]he surviving spouse has a right of election to take an elective share of one-third of the augmented estate under the limitations and conditions hereinafter stated." For a comprehensive discussion of the UPC augmented estate concept, *see* Kurtz, *The Augmented Estate Concept Under the Uniform Probate Code: In Search of an Equitable Elective Share*, 62 IOWA L. REV. 981 (1977).

[107]The augmented estate is defined in UPC § 2-202. This section begins: "The augmented estate means the estate reduced by funeral and administration expenses, homestead allowance, family allowances and exemptions, and enforceable claims . . . ."

[108]UPC § 2-202 begins:

> [The augmented estate includes the] value of property transferred to anyone other than a bona fide purchaser by the decedent at any time during marriage, to or for the benefit of any person other than the surviving spouse, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer . . . .
>
> . . . .
>
> Any transfer is excluded if made with the written consent or joinder of the surviving spouse. Property is valued as of the decedent's death except that property given irrevocably to a donee during lifetime of the decedent is valued as of the date the donee came into possession or enjoyment if that occurs first.

A bona fide purchaser is defined in UPC § 2-202(3) as a "purchaser for value in good faith and without notice of any adverse claim." It may be that a purchaser would be held to have notice of an adverse claim, or at least a potential adverse claim, if the purchaser took from a married person, or from one whose marital status was unknown, without the joinder of the spouse. An amendment indicating that nonjoinder of a known or unknown spouse is not notice to the purchaser of any adverse claim could easily solve this problem. *See* WIS. STAT. ANN. § 861.17(4) (West 1971).

the net estate if the transfer was made within two years of death[109] or if, but only to the extent that, the decedent retained at his death some control over[110] or some interest in[111] the transferred property. The net estate is also increased by the value of property owned by the surviving spouse at the decedent's death, or transferred by the surviving spouse to a person other than the decedent if the transferred property "would have been includible in the spouse's augmented estate if the surviving spouse had predeceased the decedent,"[112] to the extent that the property "is derived from the decedent by any means other than testate or intestate succession without a full consideration in money or money's worth."[113] Property derived from the decedent is broadly defined to include "any beneficial interest of the surviving spouse in a trust created by the decedent during his lifetime," proceeds of insurance on the decedent's life and proceeds of annuity contracts under which the decedent was the primary annuitant if the proceeds are "attributable to premiums paid by him."[114] Additionally, "property held at the time of the decedent's death by decedent and the surviving spouse with right of sur-

---

[109]"[A]ny transfer made to a donee within two years of death of the decedent to the extent that the aggregate transfers to any one donee in either of the years exceed $3,000.00" is included in this first category. UPC § 2-202(1)(iv). Decedent's retention of control or an interest in the property is irrelevant. This subsection does not raise a presumption of fraud on the spouse; the only way to avoid inclusion of transfers within two years of death is by obtaining the consent or joinder of the spouse. *Cf.* Model Probate Code § 33(a), (b) (gift in fraud of marital rights may be applied to payment of the spouse's share; gift by married person within two years of death is presumptively in fraud of marital rights).

[110]"[A]ny transfer to the extent that the decedent retained at the time of his death a power, either alone or in conjunction with any other person, to revoke or to consume, invade or dispose of the principal for his own benefit" is another type of transfer included in the first category. UPC § 2-202(1)(ii).

[111]Transfers "whereby property is held at the time of decedent's death by decedent and another with right of survivorship," UPC § 2-202(1)(iii), or "under which the decedent retained at the time of his death the possession or enjoyment of, or right to income from, the property," UPC § 2-202(1)(i), are included.

[112]UPC § 2-202(2). This phrase refers to any property transferred by the surviving spouse which would have been included in that spouse's augmented estate by the first category, quoted in part in notes 108-11 *supra*. UPC § 2-202(2)(ii) provides: "Property owned by the spouse at the decedent's death is valued as of the date of death. Property transferred by the spouse is valued at the time the transfer became irrevocable, or at the decedent's death, whichever occurred first. Income earned by included property prior to the decedent's death is not treated as property derived from the decedent."

[113]UPC § 2-202(2).

[114]UPC § 2-202(2)(i). Federal Social Security System benefits are excluded. "Premiums paid by the decedent's employer, his partner, a partnership of which he was a member, or his creditors, are deemed to have been paid by the decedent." *Id.*

vivorship," and "amounts payable after the decedent's death under any public or private pension, disability compensation, death benefit or retirement plan . . . by reason of service performed or disabilities incurred by the decedent" is property derived from the decedent.[115] The surviving spouse's owned or transferred property "is presumed to have been derived from the decedent except to the extent that the surviving spouse establishes that it was derived from another source."[116]

The inclusion in the augmented estate of property gratuitously transferred to third persons is intended to avoid underprotection of the spouse, which occurs when the decedent used various will substitutes to transfer ownership of property while the decedent retained continued benefits or controls during his or her lifetime. The category is "intended to reach the kinds of transfers readily usable to defeat an elective share in only the probate estate."[117] Because the provision is comprehensive, the surviving spouse's right to share the family wealth will be defeated only to the extent that the decedent made absolute transfers of property more than two years before death.

The inclusion in the augmented estate of property that the spouse derived from the decedent is intended to avoid overprotection—that is, "to prevent the surviving spouse from electing a share of the probate estate when the spouse has received a fair share of the total wealth of the decedent during the lifetime of the decedent or at death by life insurance, joint tenancy assets and other nonprobate arrangements."[118] The spouse may be overprotected only to the extent that the spouse is entitled to the homestead allowance, exempt property, and the family allowance, which are given without regard to other provisions made inter vivos or at death.

When the surviving spouse takes an elective share of the augmented estate,

> values included in the augmented estate which pass or have passed to the surviving spouse, or which would have passed to the spouse but were renounced, are applied first to satisfy the elective share and to reduce any contributions due from other recipients of transfers included in the augmented estate.[119]

---

[115]UPC § 2-202(2)(i).

[116]UPC § 2-202(2)(iii).

[117]UPC § 2-202, Commission Comments.

[118]*Id.*

[119]UPC § 2-207(a). The Comments to this section state that the effect is to protect the decedent's estate plan so far as it provides value for the surviving spouse. The spouse need not accept benefits devised by the decedent, but if the benefits are not

Then, "[r]emaining property of the augmented estate is so applied that liability for the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented estate in proportion to the value of their interests therein."[120]

The Uniform Probate Code's augmented estate provision is complex[121] and goes far in setting aside otherwise valid inter vivos transfers of the decedent.[122] Of the twelve states that have to date

---

accepted, the values are charged against the spouse's elective share as if the benefits were accepted. *Id.*, Commission Comments.

[120]UPC § 2-207(b). Subsection (c) provides: "Only original transferees from, or appointees of, the decedent and their donees, to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse." By way of example, assume that the decedent's net estate before augmentation is $110,000, that by his will the decedent devised $30,000 to his spouse and the residue to *A*, that in his lifetime the decedent transferred $200,000 to *B*, $160,000 to *C*, and $40,000 to *D* with sufficient retained control in all cases so that the transfers are included in the augmented estate by § 2-202(1) (discussed in notes 8-11 *supra* and accompanying text), and that the spouse derived a total of $150,000 from the decedent under § 2-202(2) (discussed in notes 112-15 *supra* and accompanying text). Although the property transferred to *B* and *C* is still intact, *D* used the $40,000 in an unsuccessful business venture and lost it to his creditors. Under these assumed facts, the decedent's augmented estate is $660,000 ($110,000 net estate plus $400,000 in § 2-202(1) transfers plus $150,000 in § 2-202(2) property), and the spouse's elective share is $220,000 (or one-third of the augmented estate). The elective share is made up of the $150,000 in § 2-202(2) property and $30,000 in value of the net estate, pursuant to § 2-207(a). The remaining $40,000 of the elective share comes proportionately from the $80,000 remaining in the net estate and the $360,000 given to § 2-202(1) transferees who must contribute. (Note that the transfer to *D* is included in the augmented estate by § 2-202(1), but presumably, under § 2-207(c), *D* need not contribute if *D* no longer has the property or its proceeds. Section 2-207(c) is unclear. Perhaps *D*, as the original transferee is obligated to contribute whether he has the property or not, because the language regarding contribution "to the extent . . . [one has] the property or its proceeds" arguably applies only to donees of the original transferee. If *D* need not contribute, the donees *A*, *B*, and *C* suffer; if *D* is required to contribute, then the spouse may suffer if the spouse is unable to collect from a judgment-proof transferee.) Thus, $7,273 will come from the decedent's net estate, $18,182 from *B*, and $14,545 from *C*.

[121]The drafters recognized that the complexity of the augmented estate concept may be a drawback and that litigation may be required when an elective share is asserted. The UPC § 2-202, Commission Comments state: "Some legislatures may wish to consider a simpler approach along the lines of the Pennsylvania Estates Act provision [PA. STAT. ANN. tit. 20, §§ 2508, 6111 (Purdon 1975) (discussed at notes 139-43 *infra*)] . . . ."

[122]The most far-reaching provisions are those that bring into the augmented estate the value of absolute gratuitous transfers made within two years of death, UPC § 2-202(1)(iv), and the value of gratuitious transfers under which the decedent retained possession or enjoyment of, or the right to income from, the property, UPC § 2-202(1)(i), whether or not the transfer was in all other respects a completed inter vivos gift.

enacted substantial portions of the Uniform Probate Code,[123] only seven have included the augmented estate provision.[124] Two of the remaining five are community property jurisdictions.[125] The other three states have retained more traditional estate-based protective schemes.[126]

Other states have approached the underprotection and overprotection problems without using the foreign concept of the augmented estate. In New York, if the surviving spouse is entitled to elect to take against the decedent's will,[127] the spouse's share is a portion of what is essentially a modified augmented net estate.[128]

---

[123]Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Minnesota, Montana, Nebraska, New Mexico, North Dakota, and Utah. The UPC, including the augmented estate provision, was in effect in South Dakota for six months in 1976, but was repealed. Ch. 196, 1974 S.D. Sess. Laws; chs. 175, 177, §§ 2, 3, 1976 S.D. Sess. Laws. The Wyoming legislature enacted the UPC, but the bill was vetoed by the Governor. Indiana seems to be enacting the UPC in a piecemeal fashion. *E.g.*, IND. CODE §§ 32-4-1.5-1 to 15 (1976), the "Non-probate Transfers" provisions, are taken from UPC §§ 6-101 to 113; IND. CODE §§ 29-1-8-1 to 9 (1976), provisions for dispensing with administration of small estates, are taken from UPC §§ 3-1201 to 1204.

[124]Alaska, Colorado, Idaho (with modifications to reflect the fact that Idaho is a community property jurisdiction), Montana, Nebraska, North Dakota, and Utah. Colorado added a subsection to the elective share provision of the UPC, creating a possibility that a surviving spouse may be overprotected. *See* COLO. REV. STAT. § 15-11-201 (1973), whereby the surviving spouse is given the option of taking either one-half of the augmented estate *or* one-half of the inventoried estate.

[125]Arizona and New Mexico.

[126]*See* FLA. STAT. ANN. §§ 732.201, .206, .207 (West 1976) (elective share of 30 percent of decedent's net estate); HAW. REV. STAT. §§ 560:2-201, -202 (1976) (elective share of one-third of decedent's net estate). Minnesota's provisions strike a compromise. The surviving spouse is entitled to the homestead and one-third (or one-half if the decedent left only one child or the issue of one child surviving) of the remainder of decedent's net estate regardless of provisions in the decedent's will. MINN. STAT. ANN. §§ 525.145, .16, .212 (West 1975). The spouse may also elect to take one-third or one-half against certain "testamentary" conveyances:

> A conveyance of assets by a person who retains a power of appointment by will, or a power of revocation or consumption over the principal thereof, shall at the election of his surviving spouse be treated as a testamentary disposition so far as the surviving spouse is concerned to the extent to which the power has been reserved, but the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of conveyor.

Id. §§ 525.213, .214. See the discussion of the similar Pennsylvania statute at notes 135-39 *infra* and accompanying text.

[127]The surviving spouse is precluded from claiming an elective share when the decedent leaves by will an absolute gift of $10,000 or more and also grants the surviving spouse income for life from a trust when the value of such life interest is equal to or in excess of the difference between the testamentary provision and the value of the elective share. N.Y. EST., POWERS & TRUSTS LAW § 5-1.1(c) (McKinney 1967).

[128]*Id.* § 5-1.1(b).

Certain inter vivos dispositions, if effected by the decedent after the date of the marriage, are treated as testamentary substitutes and, whether made to the spouse or to any other person, are included in the net estate subject to the spouse's elective claim.[129] The list of testamentary substitutes includes gifts causa mortis,[130] and money deposited and remaining on deposit at the date of the decedent's death in a Totten trust account or a joint savings account payable on death to the survivor.[131] Further, the list includes dispositions where the property is held at death by the decedent and another as joint tenants with right of survivorship or as tenants by the entirety,[132] and dispositions "to the extent that the decedent at the date of his death retained, either alone or in conjunction with another person, by the express provisions of the disposing instrument, a power to revoke such disposition or a power to consume, invade or dispose of the principal thereof."[133] Certain other dispositions are specifically excluded from the net estate subject to the surviving spouse's claim. These include payments under "thrift, savings, pension, retirement, death benefit, stock bonus or profit-sharing" plans; insurance proceeds; and United States savings bonds payable to a designated person.[134]

The New York scheme is comprehensive, but not so comprehensive as the Uniform Probate Code. For example, in New York, a life income interest standing alone is not sufficient control to subject the property to the spouse's elective claim, and there is no two-year transfer provision. In New York, there is more potential for both overprotection and underprotection than under the Uniform Probate Code. Underprotection may occur if the decedent is careful to dispose of his or her wealth by one of the excluded arrangements or by establishing a trust without an express reservation of a power of revocation or a power to consume, invade, or dispose of principal. Overprotection will occur to the extent that the decedent has provided for his or her spouse by using one of the excluded dispositive arrangements, such as life insurance. No other non-Uniform Probate Code statutory scheme, however, goes so far to counteract overprotection and underprotection.

In Pennsylvania, a surviving spouse may elect to take one-half of the net real and personal estate of the testator.[135] If the spouse

---

[129]*Id.* § 5-1.1(b)(1).

[130]*Id.* § 5-1.1(b)(1)(A).

[131]*Id.* § 5-1.1(b)(1)(B) & (C).

[132]*Id.* § 5-1.1(b)(1)(D).

[133]*Id.* § 5-1.1(b)(1)(E).

[134]*Id.* § 5-1.1(b)(2).

[135]PA. STAT. ANN. tit. 20, § 2508 (Purdon 1975). If the decedent is survived by more than one child, by one child and the descendants of a deceased child, or by the descen-

elects to take against the will, the spouse may also elect to take one-half of the decedent's inter vivos conveyances if the decedent retained a power of appointment by will or a power of revocation or consumption over the principal; however, "the right of the surviving spouse shall be subject to the rights of any income beneficiary whose interest in income becomes vested in enjoyment prior to the death of the conveyor."[136] An electing spouse must account for all conveyances within the above inter vivos conveyance description of which the spouse is a beneficiary.[137] Proceeds of life insurance purchased by the decedent and employee death benefits are specifically excluded from the operation of this inter vivos conveyance election provision.[138]

Underprotection and overprotection are both possible under the Pennsylvania scheme. One spouse may disinherit the other while living in comfort during his or her lifetime, for example, by creating an irrevocable inter vivos trust under which the settlor is entitled to the income for life and an independent trustee has the power to invade principal for the settlor's benefit. Furthermore, since the rights of an income beneficiary cannot be tampered with, the settlor could effectively disinherit an older spouse by creating a revocable inter vivos trust with a young life income beneficiary. On the other hand, the spouse may be amply provided for by life insurance, pension plan funds, right of survivorship assets, or assets in an irrevocable trust of which the spouse is a beneficiary, and nonetheless the spouse may elect to take against the decedent's will and against the described inter vivos conveyances without accounting for these gratuitous transfers.[139]

Delaware's attempt to prevent both overprotection and underprotection is less far-reaching than either the New York or the Pennsylvania scheme. In Delaware, the surviving spouse is entitled

---

dants of more than one deceased child, the surviving spouse is entitled to only one-third of the estate. *Id.* § 2508(b).

[136]*Id.* § 6111. If the spouse's elective share is one-third, *see* note 135 *supra*, then the spouse may take only one-third of the inter vivos conveyances. The UPC § 2-202 Commission Comments recommend the Pennsylvania statute as a simpler approach to accomplish the augmented estate result.

[137]PA. STAT. ANN. tit. 20, §§ 2508, 6111(c) (Purdon 1975). Minnesota's spousal protective provisions are similar to the Pennsylvania provisions, except that in Minnesota the surviving spouse is not required to account for any beneficial inter vivos conveyances. MINN. STAT. ANN. § 525.213 (West Supp. 1978). Thus, in Minnesota, a spouse may easily be overcompensated by the right to elect against the will and to elect against inter vivos conveyances.

[138]PA. STAT. ANN. tit. 20, § 6111(a) (Purdon 1975).

[139]*See* Note, *Spouse's Rights in Non-Probate Assets Expanded*, 54 MINN. L. REV. 1029, 1051-52 (1970) (discussing a similar Minnesota statute).

to "an elective share of $20,000 or one-third of the elective estate, whichever is less, less the amount of all transfers to the surviving spouse by the decedent."[140] The elective estate is defined as

> the amount of the decedent's adjusted gross estate for federal estate tax purposes, . . . from which is subtracted the sum of all transfers made by the decedent during his lifetime which are included for purposes of determining his federal adjusted gross estate and which were made with the written consent or joinder of the surviving spouse.[141]

The amount of "transfers to the surviving spouse by the decendent" is defined as the "amount which equals the value of the property derived from the decedent by virtue of his death."[142] The property derived from the decedent includes jointly owned property to the extent the spouse did not contribute to its value, a beneficial interest in a trust created by the decedent in his lifetime, proceeds of insurance or annuity contracts attributable to premiums paid by the decedent, and property appointed to the spouse by the decedent's exercise of a power of appointment.[143]

Disinheritance of the surviving spouse is easily accomplished under the Delaware scheme. The only assets that may be reached to satisfy the spouse's elective share are assets in the decedent's "contributing estate."[144] The "contributing estate" includes only the "portion of the elective estate of which the decedent was the sole legal owner at his death, and does not include any property of which he was a joint owner, any insurance proceeds which are payable other than to his estate, or any property held in trust."[145] Thus, even if the spouse is entitled to the maximum $20,000 share, if the decedent was not the sole legal owner of net assets valued at $20,000, the spouse has nowhere to turn for satisfaction of the elective claim. Further, because the statute sets a $20,000 maximum elective share, a spouse of a wealthy decedent may not be protected in the sense of being afforded a fair share of the total family wealth.

The Delaware scheme, however, effectively prevents overprotection of surviving spouses. Whether $20,000 or the elective estate base is used, the amount of all transfers to the surviving spouse by

---

[140]DEL. CODE ANN. tit. 12, § 901(a) (Supp. 1977).

[141]*Id.* § 902.

[142]*Id.* § 903.

[143]*Id.* § 903(1). The description of property derived from the decedent by virtue of his death is similar to and as broad as the description in UPC § 2-202(2).

[144]DEL. CODE ANN. tit. 12, § 908(a) (Supp. 1977).

[145]*Id.* § 908(b).

the decedent, which transfers are broadly described, is subtracted from the spouse's elective share.

In North Carolina, preventing overprotection of surviving spouses seems to be the only objective of the protective scheme. If the surviving spouse dissents from the decedent's will, the spouse is entitled to his or her intestate share of the decedent's net probate estate.[146] The spouse is not entitled to dissent from the will unless the value of the will provisions benefiting the spouse plus the value of "property or interests in property passing in any manner outside the will to the surviving spouse as a result of the death of the testator" is less than the value of the share of the net estate that the spouse would receive if the spouse dissented.[147] Property passing to the spouse as a result of the testator's death is generally defined to include legal or beneficial life interests, insurance or annuity proceeds, survivorship property, and the value of trust principal if the spouse has a general power of appointment over the principal.[148]

No attempt is made to recover for the spouse assets which the decedent transferred inter vivos but retained control over, or an interest in, until death. The North Carolina scheme is a traditional estate-based protective scheme with a twist preventing dissent, and preserving the decedent's estate distribution plan, if the spouse has received a share of the family wealth by extra-estate arrangements. Disinheritance of the spouse is easily accomplished by depleting the probate estate.[149] Despite the obvious statutory attempt to prevent

---

[146]N.C. GEN. STAT. § 30-3 (1976). Section 29-14 describes the intestate share of the surviving spouse, which is one-half of the net estate if one line of descendants survives the decedent, one-third of the net estate if two or more lines of descendants survive, all the net estate if no descendants and no parents survive, and $10,000 plus one-half the remaining real and personal net estate if no descendants, but one or more parents, survive. *See also* § 29-21 for the share of the spouse of an illegitimate decedent. The spouse's elective share is not always the same as the intestate share. The spouse's elective share is limited to one-half of the net estate if no descendants and no parents survive the decedent and to one-half of the intestate share if the spouse is a second or successive spouse and decedent left surviving descendants by a former marriage and no surviving descendents by the second or successive marriage. *Id.* § 30-3(a), (b).

[147]*Id.* § 30-1(a).

[148]*Id.* § 30-1(b). All property is valued at date of death. *Id.* § 30-1(c).

[149]In fact, underprotection, in the sense that the spouse is deprived of a fair share of the family wealth, may be more pronounced under the North Carolina scheme than under a forced share provision without limitations on the right to dissent from (elect against) the will. For example, assume that the decedent left $30,000 in assets in the net probate estate, although he controlled $500,000 of trust and joint bank account funds at death. Assume that the surviving spouse received nothing under decedent's will, but received $15,000 from a life insurance policy purchased by the decedent. In a forced share scheme without limitations, the spouse could take the $15,000 in life insurance in addition to a forced share of the decedent's estate, thereby counteracting the extent of the spouse's actual disinheritance. However, in North Carolina, because

it, overprotection of the spouse is a very real possibility. The only extra-estate arrangements that are involved in the computation to determine if the spouse is entitled to dissent are property interests passing to the spouse "as a result of the death of the testator."[150] Absolute inter vivos gifts to the spouse, in trust or outright, apparently are not considered in determining whether the spouse may dissent from the decedent's will.[151]

In other jurisdictions that have legislatively attempted to prevent underprotection or overprotection of surviving spouses,[152] the statutes refer to conveyances in fraud of, or made with the intent to defeat, the surviving spouse's marital rights. In Missouri, the spouse may elect to take one-half or one-third of the decedent's net estate against the decedent's will.[153] The spouse may also elect to treat as testamentary . . . "[a]ny gift made by a person in fraud of the marital rights of his surviving spouse to share in his estate" and may recover the gift from "the donee or persons taking from him without adequate consideration" and apply it to the payment of the spouse's share.[154] The burden of proving the donor's fraudulent in-

---

the spouse received the equivalent of the intestate share of the net estate by the extra-probate life insurance contract, the spouse has no right to dissent. *Id.* § 30-1(a). Note that in North Carolina, extra-estate arrangements for the surviving spouse are considered only in determining whether or not the spouse is entitled to dissent. If the spouse has received one dollar less than the intestate share by extra-probate arrangements and by the will, the spouse is entitled to the full elective share upon dissent.

[150]*Id.* § 30-1(a).

[151]The spouse may be overprotected. Assume that the decedent placed $600,000 in a revocable or irrevocable inter vivos trust with income to the spouse for life, remainder to the decedent's child. Assume also that the decedent's net probate estate of $400,000 was devised entirely to his only child. If the spouse received less than $200,000 (one-half of $400,000) by extra-probate arrangements, the spouse could dissent from the will and take one-half of the net estate. The spouse's right to income from the trust is not considered in determining the right to dissent because the income interest does not pass to the spouse by reason of the decedent's death.

[152]One other provision for protection of spouses should be mentioned. In California, in addition to the protection afforded by the community property laws, the spouse may elect against the decedent's will a share of the decedent's separate property and may recover one-half the value of any transfer made by the decedent to someone other than the spouse without full consideration if the spouse had an expectancy as defined by statute and if the decedent had "a substantial quantum of ownership or control of the property at death." CAL. PROB. CODE §§ 201.5, 201.8 (West Supp. 1978).

[153]MO. ANN. STAT. § 474.160 (Vernon Supp. 1977). The spouse's share is one-half of the net estate if no lineal descendants survive the decedent, and one-third if lineal descendants survive.

[154]*Id.* § 474.150(1). The surviving spouse may recover gifts in fraud of the marital rights whether the decedent dies testate or intestate. *Id.* The spouse of an intestate decedent is apparently entitled to recover the spouse's full intestate share of the fraudulent conveyances, and the spouse who elects against the will is apparently entitl-

tent is on his or her spouse when personal property is involved; but a presumption of fraud is raised if a married person conveys real estate without the joinder or consent of the spouse.[155]

Vermont's fraudulent conveyance provision lacks the statutory presumption of fraud[156] and is otherwise more restrictive than the Missouri provision. Only widows may set aside fraudulent transfers, and the only transfers that may be set aside are conveyances of real estate made by the husband during coverture, not to take effect until after the husband's death, and made with the intent to defeat the widow's marital share.[157] The scope of the similarly worded Tennessee provision is broader than that of the Vermont provision. In Tennessee, any conveyance made with the intent to defeat the surviving spouse's elective or distributive share is voidable at the surviving spouse's election.[158] Either a surviving husband or a surviving wife may attempt to void a fraudulent conveyance. Conveyances of real or personal property may be attacked, and there is no limitation requiring that the conveyance be one that is not to take effect until after the transferor-spouse's death.

In none of these three fraud-oriented legislative schemes, is there any provision precluding the possibility that the spouse may be overprotected by receipt of a statutory elective share and a share of the decedent's fraudulent conveyances. The fraudulent conveyance provisions are designed only to prevent underprotection, and the details of the protection are left for the courts to establish on a case-by-case basis. The factors considered by the courts[159] in determining whether the decedent's intent at the time of the transfer was fraudulent include: (1) Lack of consideration for the transfer, (2) retention of control by the transferor over the transferred assets, (3) the amount of the transfer compared to the value of the transferor's total estate, (4) whether the transfer was made

---

ed to one-half or one-third of such conveyances. The election to recover fraudulent gifts must be made "as in the case of [the spouse's] election to take against the will." *Id.*

[155]*Id.* § 474.150(2) (presumption of fraud in conveyance of real property); *see In re* La Garce, 532 S.W.2d 511 (Mo. Ct. App. 1975) (burden of proof as to fraud on spouse when conveyance is of personal property).

[156]An early Vermont case, Nichols v. Nichols, 61 Vt. 426, 18A. 153 (1889), indicated that fraud would be presumed from knowledge that marital rights would be defeated by a conveyance, but later cases rejected the *Nichols* presumption. *See* Patch v. Squires, 105 Vt. 405, 165 A. 919 (1933); Dunnett v. Shields, 97 Vt. 419, 123 A. 626 (1924).

[157]VT. STAT. ANN. tit. 14, § 473 (1974).

[158]TENN. CODE ANN. § 31-105 (Supp. 1977).

[159]*See, e.g.*, Nelson v. Nelson, 512 S.W.2d 455 (Mo. Ct. App. 1974); Edgar v. Fitzpatrick, 369 S.W.2d 592 (Mo. Ct. App. 1963), *modified*, 377 S.W.2d 314 (Mo. 1964).

openly or surreptitiously, and (5) whether the transfer was made in contemplation of imminent death. The lack of consideration and retention of control factors are the same factors that are included in statutory provisions listing the types of transfers that may be recovered by the surviving spouse to satisfy his or her elective claim. Even the contemplation of imminent death factor has received legislative approval in the Uniform Probate Code's two-year gift provision. Considerations as to whether the transfer was made openly or surreptitiously and as to whether the amount of the transfer was disproportionate in light of the total value of the decedent's estate are unique to fraud-oriented and intent-oriented jurisdictions.[160] In fact, one of the drawbacks of a fraud-oriented protective scheme is that consideration of such things as openness and disproportionateness of the transfer results in too much uncertainty for transferees and often depends on proof that is only within the knowledge of the transferor's spouse.[161]

Wisconsin's protective scheme also relies on a fraudulent transfer provision to prevent underprotection of surviving spouses. Wisconsin's statutes, however, go farther than those of Missouri, Vermont, and Tennessee because Wisconsin makes an effort to prevent overprotection. The surviving spouse is entitled to elect to take one-third of decedent's net estate against decedent's will.[162] The surviving spouse is also entitled to recover a portion of any property arrangement made in fraud of the spouse's statutory rights,[163] whether or not the spouse elects to take against the will.[164] The

---

[160]In a sense, the statutes recognize the openness of the transfer factor in provisions regarding the spouse's waiver of rights by consent or joinder. Macdonald proposed a protective scheme, in which transfers unreasonably larger under the circumstances may be reached to satisfy the spouse's claim. W. MACDONALD, *supra* note 42, at 299-327, discussed in notes 185-89 *infra*.

[161]*See, e.g.*, W. MACDONALD, *supra* note 42, at 117-19.

[162]WISC. STAT. ANN. § 861.05 (West Supp. 1977). The elective share of one-third of the decedent's net estate is reduced by any outright property given to the spouse by decedent's will. This property passes to the spouse as part of the elective share so that the decedent's estate distribution plan is preserved as much as possible. An interesting feature of the Wisconsin elective share statute is that, if the spouse requests, the court will assign to the spouse the home in satisfaction of the elective share, "unless the court finds that such an assignment would unduly disrupt the testator's plan for disposition of his estate." *Id.* § 861.13 (West 1971).

[163]The courts are statutorily authorized to subject "to the rights of the surviving spouse . . . any property arrangement made by the decedent in fraud of [the spouse's rights to an elective share, statutory allowances, and exempt property]." *Id.* § 861.17(1) (West 1971).

[164]*Id.* § 861.17(3). Recovery in the action is limited, however, to one-third of the total of the net probate estate and the fraudulently arranged property, less any property that the spouse received out of the probate estate or under the fraudulent arrangement. *Id.*

rights to elect against the will and to maintain an action to recover fraudulent property arrangements are barred, however, if the surviving spouse receives at least one-half of the total value of the following property:

> (a) the net estate; (b) joint annuities furnished by the decedent; (c) proceeds of life insurance as to which decedent had any of the incidents of ownership at death; (d) transfers within 2 years of death to the extent to which decedent did not receive consideration in money or money's worth; (e) transfers by decedent during lifetime as to which the decedent has retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary; (f) payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and the decedent's employer (but excluding worker's compensation and social security payments); (g) property appointed by the decedent by will or by deed executed within 2 years of death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse; (h) property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by the persons other than the decedent.[165]

This effort to prevent overprotection is similar to the North Carolina approach, but is more effective because of the breadth of the description of property included in the computation.[166]

C. Other Suggested Statutory Provisions

Some suggestions for revising statutory spousal protective provisions are not embodied in any of the statutes here reviewed,[167] but

---

[165]*Id.* § 861.07(2) (West Supp. 1977).

[166]The North Carolina provisions are discussed at notes 146-51 *supra* and accompanying text.

[167]Professors Haskell and Simes propose that the federal adjusted gross estate be used as the basis for determining the spouse's elective share. L. SIMES, PUBLIC POLICY AND THE DEAD HAND (1955); Haskell, *The Power of Disinheritance: Proposal for Reform*, 52 GEO. L.J. 499 (1964). Because this idea is embodied, to a limited extent, in the Delaware scheme, discussed at notes 140-45 *supra* and accompanying text, it is not further expounded upon here. The federal adjusted gross estate would be a comprehensive basis for the spouse's elective share. However, because the federal tax laws may frequently be amended, it seems preferable to describe elective estate property within a state statute enacted for the purpose of protecting surviving spouses.

must be mentioned before any conclusions can be reached as to the relative merits of a particular statutory scheme. One suggestion is reminiscent of common law inchoate dower. Professor Spies proposes that one-third of all real and personal property owned by a married person be subject to a nonassignable statutory trust in favor of his or her spouse.[168] The spouse's equitable interest in the property would be cut off by a conveyance to a bona fide purchaser, but would attach to the proceeds of the sale,[169] and would remain attached to all property gratuitously transferred by the spouse holding legal title. This statutory trust proposal would go far to prevent underprotection of surviving spouses, but the price for this prevention of underprotection is potential interference with the free alienability of the property of married persons and their donees.[170] Further, because the spouse's equitable interest in property gratuitously transferred could only be asserted after the donor spouse's death, underprotection could still occur if, for example, during the time between the transfer and the transferor's death, the donee conveyed the property to a bona fide purchaser and consumed the proceeds or made tracing of them impossible. In addition, the statutory trust concept as proposed would not prevent, and might frequently result in, overprotection of the surviving spouse, unless statutory provisions were included requiring the spouse to account for gratuitous transfers received from the decedent.

Another proposal is that the protection afforded the spouse should reflect the spouse's financial need.[171] Schemes based on need have apparently worked well in England and other British Commonwealth countries for many years.[172] Under England's Inheritance

---

[166]Spies, *Property Rights of the Surviving Spouse*, 46 VA. L. REV. 157, 183 (1960). The spouse's equitable interest would be nonassignable unless transferred at the same time as the other spouse's legal title and would be cut off by divorce or death.

[169]Apparently, even if the spouse joined in or consented to the transfer, the spouse's equitable interest would attach to the proceeds. Professor Spies does not specifically discuss waiver of the right to the equitable interest except to say that "the interest could not be released to the trustee." *Id.*

[170]Professor Haskell states: "The [statutory trust] proposal does have the disadvantage . . . of placing under a cloud all donative transfers of property, and undoubtedly many transfers for consideration, by a married person, unless the spouse joins in the transfer." Haskell, *supra* note 167, at 512-13.

[171]*See, e.g.*, W. MACDONALD, *supra* note 42, at 299-327 (1960) (discussed in notes 181-85 *infra* and accompanying text); Cahn, *Restraints on Disinheritance*, 85 U. PA. L. REV. 139 (1936); L. SIMES, PUBLIC POLICY AND THE DEAD HAND 29-30 (1955) (need is here suggested as the basis for awarding a share to family members other than the surviving spouse).

[172]New Zealand was the first to adopt maintenance legislation in 1900. Similar legislation has been in effect in Australia since 1920 and in several Canadian provinces. England adopted maintenance legislation in 1938. *See* W. MACDONALD, *supra* note 42,

(Provision for Family and Dependents) Act,[173] courts are authorized to order periodic or lump sum payments for the surviving spouse of a testator who did not make "reasonable financial provision for the applicant" in his or her will, or by the intestacy laws.[174] When awarding payments to the spouse, the court is directed to consider the "financial resources and financial needs" of the applicant and of any beneficiary of the estate in the foreseeable future,[175] the size and nature of the property in the decedent's net estate,[176] the obligations and responsibilities of the decedent toward the applicant or any beneficiary of the estate,[177] the conduct of the applicant in his or her relations with the decedent,[178] and any other circumstances that the court deems relevant.[179] The award may be satisfied only from assets in the decedent's net estate and assets transferred causa mortis.[180] Thus, although overprotection will always be prevented, underprotection may occur, as in any estate-based protective scheme, if the decedent has depleted his or her estate.

Macdonald has proposed a similar maintenance scheme, "buttressed with anti-evasion provisions."[181] Under Macdonald's proposal, a court may award the spouse any amount it deems just "if it determines that under the circumstances prevailing at the date of decedent's death the petitioner has not received a reasonable provision from the decedent by way of testamentary or inter vivos disposition or under the laws dealing with intestacy."[182] The court may satisfy

---

at 290 n.3; Dainow, *Restricted Testation in New Zealand, Australia and Canada*, 36 MICH. L. REV. 1107 (1938).

[173]Inheritance (Provision for Family and Dependants) Act, 1975, c. 63.

[174]*Id.* §§ 1, 2. Former spouses of a decedent who have not remarried, children of the decedent, persons treated as children by the decedent, and persons maintained by the decedent immediately prior to his death may also apply for an award. *Id.* § 1(1).

[175]*Id.* § 3(1)(a), (c).

[176]*Id.* § 3(1)(e).

[177]*Id.* § 3(1)(d).

[178]*Id.* § 3(1)(g).

[179]*Id.*

[180]*Id.* § 8(2).

[181]*Id.* W. MACDONALD, *supra* note 42, at 299.

[182]*Id.* at 308. The quotation in the text is taken from § 3 of Macdonald's "Suggested Model Decedent's Family Maintenance Act." The criteria to guide the court in determining whether decedent has made a reasonable provision for the petitioner are listed in § 4 of the Suggested Model Act. The primary criterion is the "petitioner's present and future financial need," but the court is also directed to consider the value of the decedent's present and future financial need," but the court is also directed to consider the value of the decedent's estate, the amount that the decedent transferred to persons other than the petitioner, the "petitioner's conduct toward the decedent," and any other circumstances deemed relevant by the court. *Id.* at 308-09. These are the same considerations as listed in the English statute, discussed in the text accompanying notes 175-79 *supra*.

the award from the assets in the decedent's estate and, if these assets are insufficient, require contribution from inter vivos transferees who received from the decedent transfers "unreasonably large under the circumstances at the time of the transfer."[183] As under any provision based on need, overprotection would never occur. Because the scheme is not entirely estate-based, underprotection is also prevented, at least to the extent that the decedent depleted his or her estate by unreasonably large transfers to a transferee who can be brought within the jurisdiction of the court.

If a share based upon need, and such other criteria as the conduct of the spouse toward the decedent, is statutorily adopted, it is impossible to predict the effect of this legislation on the courts. Whenever a spouse petitions for a maintenance award, the court would be required to hear evidence bearing upon the spouse's financial situation and conduct, as well as evidence of any other relevant circumstances, in a potentially lengthy and complex fact-finding proceeding. Perhaps, if undeserving spouses frequently petitioned the court, such a scheme would involve an inordinate amount of judicial time and effort.[184] On the other hand, perhaps, deserving spouses would be discouraged from requesting needed protection because evidence concerning their financial position and marital conduct would become a matter of public record.[185] This latter effect could result in egregious underprotection of spouses who might at least be somewhat protected under a fixed share scheme.

III. Concluding Observations

At the present time, the Indiana courts and legislature are committed to a policy favoring the free inter vivos alienability of prop-

---

[183]Section 6(b) of the Suggested Model Act, W. Macdonald, *supra* note 42, at 310-11. Section 7 of the Suggested Model Act, *id.* at 312, lists the factors to be considered in determining whether the transfer was unreasonably large under the circumstances. The factors include the relative size of the transfer compared to the wealth retained by the decedent, moral or legal obligations of the decedent to make the transfer, the amount of any consideration paid by the transferee to the decedent, and any other circumstances deemed relevant by the court. Professor Haskell states: "[A] weakness in the proposed act is the absence of any objective standard for the determination of the unreasonableness of the inter vivos transfer" and suggests that the "question of the size of the permissible inter vivos transfer might better be treated with some specificity." Haskell, *supra* note 167, at 516.

[184]Dean Plager concluded in 1966 that protection of surviving spouses would probably not become a substantial activity of the courts if a scheme more sensitive to the spouse's actual needs were adopted. Plager, *supra* note 4, at 715.

[185]One should not too readily conclude that because spouses in divorce proceedings are willing to make their finances and marital disharmony a matter of public record, spouses in probate proceedings would be similarly willing to place all relevant circumstances on the record.

erty rather than a policy favoring equitable protection of surviving spouses from disinheritance. Under Indiana's fixed share, estate-based election statute, underprotection and overprotection of surviving spouses are very real possibilities. Although courts in other jurisdictions have done so, the *Leazenby* court was unwilling to adopt one of the various judicial tests that have been used to counteract the underprotective aspects of this type of protective scheme. The *Leazenby* court was correctly concerned with the vagueness of the various tests and the hardship that uncertainty imposes upon "conscientious settlors and beneficiaries who cannot be certain which good faith arrangements will be upheld."[186] Furthermore, even if the *Leazenby* court had decided to take some action to counteract the underprotective aspects of the scheme, the overprotective aspects would remain. The overprotective aspects cannot be dealt with judicially: No one can complain if a spouse takes advantage of the unconditional elective right.

The purpose of this discussion has been to illustrate that underprotection and overprotection may occur under the present statutory scheme and to review other legislative responses to the problem. Because the underprotective and overprotective features of each scheme have already been presented, only a few observations are in order.

The provision that most effectively prevents overprotection of surviving spouses is one based upon the spouse's need. Next in efficacy is the comprehensive augmented estate provision of the Uniform Probate Code. The augmented estate provision does not prevent overprotection as well as a need provision does because an independently wealthy spouse who received few inter vivos gifts from the decedent might elect a substantial share of the decedent's augmented estate, while that same spouse would not be permitted to interfere with the decedent's estate plan in a need jurisdiction. This points out a question that must be faced before determining what kind of protective scheme to adopt: Is a spouse entitled to a share of the family wealth solely because of the marriage relationship, or should spouses be forced heirs only if they need money for their support? Closely related to this question is the question of whether to adopt a scheme which gives the trial court great discretion in making protective awards or to adopt one where a presumably adequate share is spelled out in the statute. In the United States, the first question has been answered in favor of the position that the marital relationship is sufficient justification for a

---

[186]355 N.E.2d at 864.

claim to some portion of the decedent's estate.[187] The second question has been answered in favor of spelling out the share (typically one-third or one-half) in the statute.

Once a choice is made between a fixed share scheme and a discretionary share scheme, the next consideration is the definition of the estate of the decedent upon which the fixed share will be based and from which the fixed or the discretionary share may be satisfied.[188] Defining the estate to prevent overprotection is necessary only under a fixed share scheme and is easy as a policy

---

[187]*See* Haskell, *supra* note 167, at 525:

> My proposed revision of the law on the subject disinheritance of close family adopts a form of limited forced share for children, accepts the present forced share for the spouse, adopts a form of restraint based on need for parents, and adopts devices to protect the beneficiaries from disinheritance by inter vivos disposition.
>
> Why do I emphasize the forced share approach, rather than the flexible restraint based on need, proposed by others? To begin with, I do not believe that need should necessarily be the exclusive criterion for the determination of the claims of spouse or children. I believe that consanguinity may be justification in and of itself for claim to some portion of the property of the decedent. I would not attempt to offer a reasoned justification for this position, since it involves considerations which I do not believe have their roots in reason. I believe, however, that it is a view widely held, albeit inadequately articulated.

[188]Two other considerations, although beyond the scope of this discussion, are appropriate for legislative analysis in connection with a rethinking of the elective share statute. First, should the legislature deal with underprotection of spouses of an intestate decedent? If provisions defining an augmented elective estate are applicable only when the spouse elects to take a share against the decedent's will, then the decedent might easily avoid augmentation of his estate for elective share purposes by dying intestate after having depleted his net estate by inter vivos dispositions. Second, should children and parents be potential recipients of protection provisions? At present, children receive limited protection against disinheritance in Indiana. Children who are under 18 years of age at the time of the decedent's death are entitled to share the $8,500 survivor's allowance if there is no surviving spouse. IND. CODE § 29-1-4-1 (Supp. 1978). Children born or adopted after the decedent made his will and not provided for in the will may receive their intestate share of the decedent's estate, "unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to the spouse who survives him." *Id.* § 29-1-3-8(a) (1976). *See also id.* § 29-1-3-8(b) regarding children believed to be dead. Parents are not protected from disinheritance. Several proposals for reform of protective provisions include protection against disinheritance for the children and sometimes the parents of the decedent. *See, e.g.*, W. MACDONALD, *supra* note 42, at 299-327 (children under 18 at the time of decedent's death and children 18 or over but who are physically or mentally incapable of maintaining themselves may petition for maintenance under the proposed maintenance statute); Cahn, *supra* note 171 (proposes a compulsory share of the decedent's estate for dependent widow or children based on need); Haskell, *supra* note 167 (proposes a variable forced share for children and a share based on need for parents).

matter because no third parties are involved. The likelihood that overprotection will occur diminishes as the definition of property for which the spouse must account becomes more inclusive.

Defining the estate to prevent underprotection is more difficult as a policy matter because third-party donees will be involved. The legislature must determine to what extent it is willing to force inter vivos donees to contribute to the spouse's elective share.[189] The Uniform Probate Code's augmented estate provision is the most effective in preventing underprotection, because it specifically delineates the types of transfers subject to the spouse's elective claim and also includes all varieties of transfers that might be used to defeat a spouse's claim. Specificity is important if certainty and predictability for transferors and transferees are to be achieved.[190] Yet, if the statutory definition is specific but not as inclusive as the Uniform Probate Code provisions, underprotection may occur. Once there is a loophole, transferors desiring to exclude their surviving spouses may make use of it.

One thing is clear, especially after *Leazenby*: The legislature must act if anything is to be done to prevent overprotection and underprotection of surviving spouses in Indiana. The *Leazenby* court should not be criticized for refusing to assume the responsibility for counteracting underprotection. The responsibility for counteracting both underprotection and overprotection is that of the legislature.

---

[189]It must be remembered that whenever third party transferees are to be called upon to contribute to the spouse's elective share, sales to bona fide purchasers and tracing problems may diminish the protection afforded.

[190]Schemes under which the spouse's protection depends upon such things as the transferor's fraudulent intent or the unreasonableness of the transfer are inadequate because they are too vague and uncertain.

In the Public Interest: The Precedents and Standards of a Lawyer's Public Responsibility

*James F. Smurl**

Even the most casual observer of the legal profession quickly becomes impressed with the extent and depth of the changes which have begun to occur in the American bar during the last decade. The 1977 Supreme Court decision[1] allowing advertising of legal services and the impact it has already had on the structure and functioning of the bar is but one, in a significant series of changes which have occurred in response to a publicly-perceived need for a fairer distribution of legal services.

As an observer who is a social ethicist, I have been intrigued by the reasons offered for these changes—especially by the reasons supporting claims that the profession has a moral obligation to make legal services fully available. With often stirring rhetoric, but sometimes confused explanations of public responsibility, the more institutionalized forms of legal practice in America—government and corporate lawyers, large private firms, and the bar associations[2]— have sought to assure first the poor, and increasingly those of moderate income as well, that legal services will be much more accessible to them. In this effort, the profession has helped create some new patterns of delivery, which are supported by reasons as little understood as they are discussed.[3] This Article will seek to remedy some of that neglect by giving extended attention to the rationales behind changing patterns in the delivery of legal services.

Despite the progress already made and developments anticipated through plans now only in the experimental stage, a number of practical and theoretical problems remain unresolved, but in such a way that a steady and continuous progress depends upon their resolution. The policies and practices necessary to finance and regulate newly-developing patterns of delivery are surely some of the most challenging practical considerations. High on the list of

---

*Associate Professor of Religious Ethics, Indiana University—Purdue Univeristy at Indianapolis.

The research for this Article was supported by a faculty improvement grant from Indiana University—Purdue University at Indianapolis. The author wishes to express his appreciation to the library staffs of the American Bar Center and the University of Chicago and of the contributions of James F. Bresnahan.

[1]Bates v. State Bar, 433 U.S. 350 (1977) (5-4 decision).

[2]Private practitioners are probably less influential on the social and institutional shape of the profession.

[3]*See* M. SCHWARTZ, LAW AND THE AMERICAN FUTURE 9 (1976).

theoretical issues with great practical significance—especially in the formulation of policy—are social-ethical considerations concerning the nature and requirement of fairness in the distribution of the benefits and burdens of legal services if they are to be made fully available to the public.

As an ethicist observer of both the changes wrought in legal services since the mid-1960's and the explanations offered for them, I am puzzled by what I apprehend as some confusing and not always logically justifiable judgments concerning the meaning and application of one of the legal profession's "important functions[:] to assist in making legal services fully available."[4] Whether that function is to be considered an obligation, and whether it involves an appeal to distributive justice are questions not always answered clearly. There are few clear answers to questions regarding the subject of this putative obligation. Even if this question is answered clearly, there remains some ambiguity concerning its logical warrants. To the degree that ambiguity and unclear reasoning prevails in the answers to such questions, I believe that the progress already made, as well as that which is anticipated in the delivery of legal services, perforce will be impaired—especially since the policies that are to guide delivery practices depend in large part upon reasonably clear answers to the questions posed above. Assuming, then, that there is an important, albeit not always effective, connection between having answers to such questions and the policies and practices developed to deliver legal services, this Article will seek to explore analytically some judgments about the nature of the obligation to make legal services "fully available."

In this Article, I propose consideration of some traditional and precedent-setting moral judgments that have animated the profession's efforts to assure that legal services will be available. One such judgment alleges an obligation to be benevolent and to do works of charity or almsgiving. It encourages the cultivation of internal states—dispositions and intentions—but fails to state a rule of action. Thus, the subject of this obligation will not always be clear about what is precisely required. In addition to this intuitive judgment there is another which assumes that, by working zealously for the interests of the individual client, lawyers are thereby serving the public interest or that the gains made for the individual will transfer automatically to the common good. Finally, Canon 2 of the American Bar Association Code of Professional Responsibility will

---

[4]ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 2-1 (1977 version) [hereinafter cited as ABA CODE].

be analyzed in order to determine how the above judgments continue in force.

Two recent facts related to the provision of legal services in the last decade serve as proximate boundaries in an historically important symbiosis of values shared by the leadership of the legal profession and those persons whose declarations about the key values in American culture have been given normative status. One is the fact that, while legal aid in various voluntary and associational forms dates back to the late 19th century and gained momentum in the early part of this century, organized and stable efforts to provide legal services for those persons who needed aid but were unable to pay for it did not reach meaningful levels until 1965. Before the creation of the Legal Services Program under the auspices of the Office of Economic Opportunity, the history of legal aid was largely a story of voluntarism or elective benevolence, ad libitum, and depended upon the irregular stirrings of altruistic motivations. The continuing significance of that record must be recalled in order to grasp the source of the paradox that what the American Bar Association today refers to as an "important function[:] to assist in making legal services fully available"[5]— others argue is a much more determinate kind of "imperative" (either moral or constitutional).[6]

The other bracketing fact is the recent publication of a national survey entitled *The Legal Needs of the Public*.[7] A joint undertaking of the American Bar Association and the American Bar Foundation, but funded as well by five other agencies, the survey has been one of the most expensive, thoroughgoing, and perhaps the last need-study of its kind.[8] Surveys, occasioned by a governmentally-supported desire to identify and to meet better the needs of the poor, expanded to include information about those persons with above-poverty or mid-level incomes.[9] They now seem to be concluding with a study which seeks to obtain a representative sampling of need across a very broad economic spectrum.[10]

---

[5]*Id.*

[6]*See, e.g.*, Anderson, *Indigents' Right to Appointed Counsel in Civil Litigation*, 66 GEO. L.J. 113 (1977).

[7]B. CURRAN, THE LEGAL NEEDS OF THE PUBLIC (1977).

[8]*See* RESOURCE CENTER FOR CONSUMERS OF LEGAL SERVICES, THE ROLE OF RESEARCH IN THE DELIVERY OF LEGAL SERVICES, WORKING PAPERS AND CONFERENCE PROCEEDINGS 217 (1976) [hereinafter cited as ROLE OF RESEARCH].

[9]B. CHRISTENSEN, LAWYERS FOR PEOPLE OF MODERATE MEANS (1970). Christensen's judgment is that very few "people of modest means really see the practice of law as a 'noncommerical' enterprise, or that they would be especially shocked or alienated by advertising or solicitation by lawyers." *Id.* at 152-53, *cited in* Bates v. State Bar, 433 U.S. at 369.

[10]*See* B. CURRAN, *supra* note 7, at 70-74.

While granting that these surveys enlarged the data base and that the most recent study is, methodologically speaking, much more sophisticated than its predecessors, critics still point to certain seriously defective assumptions operative in all such need-studies.[11] Leaving discussion of those flaws to persons more skilled in the techniques of the social sciences, I draw attention to some controlling assumptions which are more directly related to social ethical concerns. In particular, I should like to highlight the surveys' assumptions that past use of legal services and client-centered perceptions of need ought to be normative in determining the kinds of services needed. According to one writer, until these assumptions are challenged and new goals, priorities, and methods are established for the study of needs, surveys of the problem of legal services will be dominated by a "flat, static view of but one part of an extremely complex network of political, economic and social institutions which, in the final analysis, tend to determine our view of conflict, injury and redress, and either validate or invalidate individual or group isolation."[12]

Because the surveys generally do not question traditional assumptions about the ways in which legal services are organized and distributed, they tend to suggest incremental, rather than radical changes.[13] Therefore, these studies leave unexamined potentially crucial flaws in the system of rules, the institutions designed to apply them, and the capabilities of people who seek to use them.[14] Left unattended as well are issues such as the quality and effectiveness of the services provided,[15] bar-imposed impediments to new forms of public responsibility, static definitions of property and property rights, and the meaning and application of notions of social justice—a term which includes, but is not limited to, questions about how fairly to redistribute wealth and power in this society.[16]

There is obviously a great deal to be considered in the area of legal aid. In this Article I shall consider only three interrelated social ethical judgments which have animated the legal profession's expressed desire to honor constitutional commitments to "due process" and "equal protection of the laws" through legal services. The

---

[11]*See, e.g.*, ROLE OF RESEARCH, *supra* note 8, at 217.

[12]Marks, *Some research perspectives for looking at legal need and legal delivery systems: old forms or new?*, in ROLE OF RESEARCH, *supra* note 8, at 34.

[13]*Id.*

[14]Galanter, *Delivering legality: some proposals for the direction of research*, in ROLE OF RESEARCH, *supra* note 8, at 68.

[15]Carlson, *Measuring the quality of legal services: an idea whose time has not come*, in ROLE OF RESEARCH, *supra* note 8, at 145.

[16]*See* Brickman, *Preface*, *supra* note 8, at viii; Marks, *supra* note 12, at 47-48.

three judgments concern: (1) The elective, voluntary and benevolent character of the pro bono requirement; (2) the causal connection between litigation in the adversary system and the achievement of social justice; and (3) the ethical considerations which form a part of Canon 2 of the Code. While not exhaustive, and while not fully attentive to the more specifically political and economic dimensions in these judgments, this selection of certain ethically interesting ambiguities can serve at least to draw attention to such matters and to suggest further consideration by others more conversant with those areas.

I. "Pro bono" as Character-forming Elective Benevolence with Beneficial Social Consequences

"Pro bono publico" is a slogan or maxim used to express a sense of public responsibility in the practice of law in western civilization. In its usage by members of the American bar, it has been truncated linguistically to "pro bono"—"in behalf of good" (perhaps akin to "doing good") with no substantive content assigned to the verb or the substantive adjective. In this abbreviated form, the formula symbolizes a potential diminution in content as well as form. The nature of the obligation symbolized in this slogan has been transmuted verbally and conceptually to signify almost *any kind* of goodwill gesture in the *general* direction of the community and arising from most *generic and inchoate* senses of altruism. Thus, it is now associated with behaviors that are related very indirectly, if at all, to the specific kind of contributions a legal professional might make toward the common good. For instance, few would find a specifically legal contribution in acts some lawyers have regarded as pro bono work—umpiring Little League or serving on the boards of charitable organizations.[17] Additionally, the obligation to serve the public interest has not always been associated with the characteristic daily activities of "lawyering," but has come to be regarded as an after-hours activity. Thus, it currently means a voluntary, free, but potentially and personally enriching or ennobling experience—and one which is quite apart from the income-generating business of zealously advocating a client's interests.

Some important causal factors and certain allied, though problematic, social ethical judgments leading to this situation can be found in a consideration of the American legal aid movement, which began in the late 19th century. A more complete record of this

---

[17]F. Marks, K. Leswing & B. Fortinsky, The Lawyer, The Public, and Professional Responsibility 8-9 (1972) [hereinafter cited as F. Marks]; E. Smigel, The Wall Street Lawyer: Professional Organization Man? 10 (1964).

movement is available in various reliable sources.[18] A thumbnail sketch is given here to create a context for the discussion of the not-fully-supportable ethical judgments entailed in the movement and which continue to influence contemporary considerations of the scope of "pro bono publico."

Originally, there were two protective agencies which restricted legal services to certain categorical groups: the New York German Society established in 1876 to fend off the exploitation of German immigrants, and the Chicago Protective Agency for Women and Children begun in 1886 to seek redress for female victims of seduction and debauchery. The first true legal aid society—one with neither ethnic nor sexual eligibility requirements—was established by the Chicago Ethical Culture Society and was called the Bureau of Justice. With the exception of another such legal aid office opened in Jersey City in 1894, organized service was restricted to two geographical areas by the turn of the century.[19] Legal service agencies expanded slowly into four or five additional major cities by 1909 and rather rapidly to twenty-four other cities between 1909 and 1913. At the end of that period, only one agency was not private, voluntary, and supported by charitable donations of money and professional time. The Kansas City Bureau was the only agency operating as a municipal office and funded with public monies.[20] Although shortly thereafter the Kansas City pattern was emulated by several other cities,[21] this method remained atypical as an organized way of assuring legal aid to indigents. With respect to funding and management, the typical agency was the legal counterpart of the early 20th century charitable hospital and dispensary both of which were attempts to make medical care available on a more organized and predictable basis in urban areas where the initiatives of private practioners were insufficient to meet health care needs. Although changes in the case of medicine began to occur after the Depression, organized legal aid efforts did not begin to lose their almost complete dependence upon voluntarism and elective benevolence for funding and personnel until the 1960's.

The legal aid movement grew very rapidly between 1914 and 1918 under the diligent leadership of Reginald Heber Smith and achieved a measure of national unity through an organization he

---

[18]*See, e.g.*, J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); Cappelletti, *Legal Aid: The Emergence of a Modern Theme*, 24 STAN. L. REV. 347 (1971-1972).

[19]R. SMITH, JUSTICE AND THE POOR, 134-40 (1924).

[20]*Id.* at 145-47.

[21]In 1919 there were 9 such offices; there were 12 in 1932 and only 5 in 1962. E. JOHNSON, JUSTICE AND REFORM 17 (1974).

launched in 1923: The National Association of Legal Aid Organizations, later to be known as the National Legal Aid and Defender Association. But there were very few experiments akin to that of Kansas City. Most of the agencies were known as "departments of organized charities" and were perceived by the bar and the community as institutionalized forms of almsgiving.[22] Like other such organizations which were completely dependent upon voluntary contributions but which were not as crucial to survival as bread and soup lines, the legal aid societies declined during the Depression. This decline continued into the 1950's when, paradoxically, during the McCarthy era, these societies prospered, perhaps due to the atmosphere created therein—namely, the distrust of any sign of "creeping socialism."[23] That they should prosper in such an environment was, in part, a result of a prevalent national preference for traditional American forms of voluntary and associational self-help movements, and, in part, a consequence of the stature and persuasive voice of Roscoe Pound, who maintained that efforts to develop a socialized legal service would be tantamount to making the legal profession into a trade union.[24]

Hence, events conspired to prohibit serious consideration of governmental, especially federal, subsidization of legal aid until the experiment of the Office of Economic Opportunity in the 1960's. Related to, but still somewhat independent of these events and the socio-political forces they entailed, are certain ethical notions and judgments which animated the leadership of the legal aid movement and which were used as grounds for convincing others that a public need existed for which the profession had some responsibility. In its most national, organized, and true form, under the impulses of Smith, the movement was imbued with a sense of compassion for the poor and was animated by Roscoe Pound's definition of a profession as a learned group serving the public interest.[25] This compas-

---

[22]R. SMITH, *supra* note 19, at 145-49.

[23]*See, e.g.*, J. AUERBACH, *supra* note 18, at 230-62. *See also*, E. JOHNSON, *supra* note 21, at 17-18. Johnson maintains that, until 1950, publicly funded legal aid offices, though never very extensive, were still a "respectable alternative." *Id.*

[24]ABA STANDING COMMITTEE ON LEGAL AID WORK PUBLICATIONS (Sept. 1, 1950) (unpublished typescript in Cromwell Library of American Bar Center, Chicago, Ill.). This opposition to "socialized legal service" is reflected in Smith, *Introduction* to E. BROWNELL, LEGAL AID IN THE UNITED STATES at xvi-xvii (1951).

[25]R. POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 5 (1953) (prepared for and published by the Survey of the Legal Profession) (copyright held by R. Smith). To clarify the Smith-Pound interdependence prior to the 1950's we should consider the following: Pound taught Smith at Harvard and was his consultant on jurisprudential dimensions in the survey of legal aid reported in his 1919 publication of *Justice and the Poor*, in which Smith refers to Pound as a "voice crying in the wilderness." R. SMITH, *supra* note 19, at 7-8 (citing Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REV. 395 (1906)).

sionate idealism may have dulled the sense of urgency for law reform and for the structural changes some believed essential to a more just system of rules and applications. In fact, even Smith exhibited a curious ambiguity in his simultaneous insistence that there was some unfairness in substantive law affecting the poor, but that such law was reasonably sound for the moment. Arguing further that substantive law is impotent finally to safeguard equality unless impartial administration is guaranteed, he urged that the administrative machinery be overhauled and that the movement concentrate on the elimination of such procedural barriers as delays, court costs, and the expense of counsel.[26] Concentrating primarily on the latter barrier and attempting to eliminate it through voluntary and associational donations, Smith was dismayed by the "poor" attitudes as well as the degree of personal, fiscal, and moral support in both the lawyers he tried to enlist and the general public.[27] From the start he encouraged attorneys to acknowledge a duty to the poor, but he did so in more motivational than demonstrable forms of appeal.[28]

The irregular rationality and the ineffectiveness of this approach comes more clearly to the fore both in comments made by Smith and in events surrounding him in the 1950's. In his introduction to Emery Brownell's 1951 study of legal aid needs,[29] Smith noted that these needs were then more critical than ever, especially considering worldwide "tensions and restiveness."[30] In the foreward to the same study, Harrison Tweed maintained that, if not promptly met, these needs would occasion a government "take-over" with predictably undesirable consequences for the autonomous self-regulation of the profession.[31] While Smith continued to give primacy to idealistic motivational appeals, Tweed and Brownell attempted to make the case on much more pragmatic and utilitarian—indeed, even egoistic—grounds. They argued that legal aid agencies, if well sup-

---

[26]R. SMITH, *supra* note 19, at 15-16.

[27]*Id.* at 226-39.

[28]Smith sought to ground his case for the lawyer's duty to the poor on the fact that a lawyer is a minister of justice and an agent of the court, but also tried to find support in "accepted standards of ethics," in professional codes including an early 19th century code by David Hoffman. Since Smith cites the following passage, and since it is prototypical of the ambiguities in his motivational appeals to "duty," I cite the entire passage here: "I shall never close my ear or heart because my clients' means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue or be defended; and they shall receive a due portion of my services, cheerfully given." R. SMITH *supra* note 19, at 233.

[29]E. BROWNELL, LEGAL AID IN THE UNITED STATES (1951).

[30]Smith, *supra* note 24, at xiv.

[31]Tweed, *Forward* to E. BROWNELL, LEGAL AID IN THE UNITED STATES, at iii (1951).

ported and active, would help keep people off the relief rolls; would keep nonpaying clients out of private offices; would offer young attorneys valuable experience, and would help build a better public relations image for the bar.[32] Although Smith exhibited considerable talent and interest in organization and practical affairs,[33] he pressed the case for the support of the legal aid movement in lofty, idealistic and rhetorical terms. This is nowhere clearer, perhaps, than in an appeal to law students in 1953. Relying importantly on religious metaphors, he asked law students to remember that they were to become the *stewards* of people's liberties and properties and urged them to be faithful in the bearing of this *chalice*.[34] Finally, near the end of this somewhat stylized urging, he offered the students reasons to reject the theory that a lawyer might proceed, first, to become financially secure and, then, as a supplement, might become devoted to public service. As a retort to such a "philosophy" he told the young lawyers: "[W]hen you reach that point, the people won't trust you. They'll say 'What has this rascal been doing all his [sic] life, and what is the sudden need for *conversion* and *forgiveness*.' "[35]

Implying, of course, that prodigals are considered less virtuous than good, faithful, and generous stewards, Smith lays bare some characteristic premises in his undaunted idealism. Appealing to what he believed to be the higher-or better and nobler-dimension in humans, he rested his case for public service on the grounds that it could do much to enhance one's self-image and public regard. Thus, just as he invoked Roscoe Pound's idealism in his use of Pound's definition of the professional, so too he appealed to a very particular kind of religiously-grounded moral viewpoint which, I think, was centrally important in his leadership and its continuing influences.

Ethics is usually defined as the systematic and disciplined critical analysis of moral arguments—namely, those cases which people make in support of moral claims, or what is morally to be done or avoided, with justifying reasons given, and which are built upon a set of premises or assumptions. In turning the light of ethics upon what I previously have called in more "everyday" terms ethical notions and judgments in the legal aid movement, I shall try now to use the more precise language given in the definition above. I invite the legal professional to "inhabit" another field of study for a brief time, primarily in order to understand not only how ambiguities might arise but also how they may be resolved in the legal profes-

---

[32]*See* E. JOHNSON, *supra* note 21, at 9.

[33]*See* Smith, *Law Office Organization* (pts. 1-4) 26 A.B.A. J. 393, 494, 610, 648 (1940).

[34]R. SMITH, THE OPPORTUNITY IS YOURS 1-5 (1953).

[35]*Id.* at 4 (emphasis added).

sional's effort to express and justify what Smith called "the lawyer's duty to the poor" and what others have called, still more generically, an obligation to serve the public interest.

Not every statement concerning alleged obligations is, or is intended to be, a moral claim. Some such statements are intended only to communicate a *generic* judgment that "*something* ought to be done" for *some* reason on *any* grounds. Others express a more *specific* judgment which suggests particular reasons and grounds for the obligation, but not all such specific claims are moral. Some are political, social, customary, economic or constitutional. These statements are sometimes called "nonmoral" to distinguish them from more stringently and properly designated moral judgments. There are also some judgments which fall between the moral and the nonmoral—judgments in which the intentions and words of the claimants are not entirely clear or in which both moral and nonmoral statements are mixed, at least in the reasons given to support the claims. For example, some statements urge a moral duty to do something but also contain references to professional, political, economic, or other forms of obligation. Finally, and distinguishable from both nonmoral and semimoral claims, there are those statements which are most specifically and properly moral—namely, those which are not only normative ("ought") but also universalizable and other-regarding claims about what is to be done or avoided. In this more stringent form, moral claims are difficult to make precisely and are found primarily in professional ethical treatises. Unfortunately, however, moral claims are often most inchoate, imprecise, and rhetorical in the urgings of public and political leaders.

With these clarifications in mind, I should like to submit a disclaimer. What follows should not be taken to be a reckless or arrogant reading by an outsider who fails to understand how ordinary language functions or who is unwilling to acknowledge that, even among professional ethicists, there is always some nagging uneasiness about the clarity of their own work, as well as a certainty that even those rare cases of completely unambiguous argument will certainly draw critical rejoinders. Rather, what follows is an attempt to do what ethicists have learned humbly to accept as one of their major contributions in public policy discussions—namely, to press certain kinds of questions upon claimants and their arguments (especially those which either are or appear to be moral), to ask for clarification of the claims, warrants, and grounds of those arguments, and to suggest how better to make a moral case, if indeed such is possible in the issue at hand.

Just as law has its rules for legal rules, so too does ethics have rules for moral rules. Unlike the power which accrues to certain

rule-making decisions in the law—to wit, a power to declare certain laws invalid or illegitimate—there is an absence of similar authority in the field of ethics. More tentatively, but not always without precedents, ethicists must argue for the reasons behind and the applications of their rules for moral rules. Unlike certain legal guides for rule-making, however, these ethical rules are not as highly institutionalized (excepting, perhaps, some very few examples of academic or religious forms of ethics). Thus, ethical rules do not enjoy the same degree of social staying-power and certainty which accrues to the institutions of legal rule-making and application.

Granting some of the major differences cited above, it seems possible, nonetheless, for professionals in law and ethics to address each other from the vantage point of the reasons rather than the power behind the rules for their respective disciplines. It is not unreasonable to hope that we may be able to understand each other and to suggest both possible causes and remedies for errors of fact or judgment in each other's field. With hope so grounded and in light of the preceding set of premises, I propose the following ways of identifying problematic moral claims and assumptions in the traditional and still influential judgments regarding the obligation to public service.

Criteria or action-guides, devised to express what people judge to be morally right or wrong and grounded in a theory of morality, can be classified according to the degree of objectivity they embody. The more demonstrable and determinate the criteria, the more they are independent of the relativities of time, place, and circumstance. They are, thus, more universalizable and debatable on reasonably objective grounds. Such are the moral criteria and theories of *law* (natural, moral, religious, and civil insofar as it entails one of the other three), *utility* (act and rule determinations of harms and benefits) and *formal moral principles* (such as reciprocity and fairness). Less demonstrable, determinate, and, thus, more completely dependent criteria are those found in the moral action-guides and theories of *perfectionism*, *intuitionism*, *naturalism*, and *developmental evolution*. These latter theories tend to emphasize growth, development, attitudes, sentiments, and dispositions. Thus, they are sometimes associated with a theory of morality called "the ethics of virtue," as contrasted with "the ethics of duty" which is more commonly associated with the more determinate and demonstrable criteria.[36]

While these categories are not so hard and fast as to prohibit the presence of each in any one particular argument or moral

---

[36]*See* W. FRANKENA, ETHICS 63-65 (2 ed. 1973).

system, most positions tend to be predominantly one or the other. And, while the designations "ethics of virtue/duty" can mislead one to oversimplify some arguments, they provide nonetheless a workable way in which to discuss the classification of criteria explained above in less readily oversimplified terms. With those disclaimers in mind, I should like to acknowledge that, in using these designations in an effort to evaluate the cases made for the pro bono obligation, I subscribe to a theory that the more demonstrable, determinate, and less completely dependent set of criteria called "formal moral principles" are the most defensible theoretically. While acknowledging that formal principles are lacking in the motivational power possible in other more lyrical action guides, I find that they are much more rational and defensible. The "whys" and "wherefores" of this position are not entirely pertinent here, but shall be apparent nonetheless in the following critical analysis.

I recall the salient characteristics of Smith's case for the "lawyer's duty to help the poor." The language is that of a moral claim. It is, at the very least, semimoral and, clearly, is not entirely nonmoral. Furthermore, it is buttressed with reasons which tend to make the claim less truly determinate and demonstrable—to wit, by emphasizing the character-building and personally enriching dividends for the lawyers who donate their services. Thus, a claim which appears on first glance to be in accord with an "ethics of duty" accords better, in its supporting justifications, with an "ethics of virtue." That virtue and not duty is central to Smith's perspective can be seen in his emphasis on notions of fidelity and conversion in the 1953 address to law students, and is still more obvious in the premises upon which he tried to organize the National Association of Legal Aid Organizations. Relying almost completely upon volunteered funds and personal services, the movement under Smith's tutelage relied upon the presence and regularity of impulses of elective benevolence in both legal professionals and in other supporters of the movement. Assuming people could and would choose consistently to assist those in need of legal counsel, he fashioned a strategy to bring this need to people's attention and to appeal to their senses of compassion and fair play. And this strategy had to be able both to stir and to direct the other-regarding impulses of the people he had targeted as "volunteers." One way to prick such sensibilities and movements of the heart is, as Smith seems to have discovered, to note the personal satisfactions and community regard which sometimes accrue to persons acting altruistically. While dividends such as these need not be regarded as entirely egoistic, they are nonetheless somewhat traditional and conventional ingredients in popular views of the rewards attendant upon a life of vir-

tue. Linked to a proverbial biblical wisdom, hallowed, in part, by knowledge of its source and, in part, because of its extensive influence in our culture, this kind of virtue is accompanied by an expectation of a return for the bread cast upon the waters and, thus, is finally egoistic or in one's own best interests.

I should like to offer a critical appraisal of Smith's case. Reiterating my position that the more demonstrable arguments are the most defensible theoretically, I now single out two ways in which Smith's case must be considered rationally indefensible. First, compassion or love is terminologically and notionally indeterminate. Until a more specific content is assigned the "obligation" to love others, it is inchoate and an expression of an ideal whose approximation is not indicated. Thus, ethicists who promote this ideal—in terms of "love" by those whose grounds are primarily religious, and as "beneficence" by those whose premises are more exclusively philosophical[37]—seek to explain it in the more specific terms of justice. Smith did not make this connection and interpretation; his case rests on an indistinct and indeterminate action-guide. In fact, as contrasted with the term used by some philosphical ethicists, Smith's claims are associated more with the word "bene*volence*" than with the term "bene*ficence*" with a significant difference between the italicized roots—namely, *willing* and *doing*. A second criticism rests on the premise that, when attempting to assign a specific content to "love" or "beneficence" people generally have recourse to the more determinate notions and criteria of justice. In order to develop a moral argument for an obligation in this fashion, one must distinguish between several different notions of moral justice—namely, justice as reciprocity, as regularity, and as fairness in both exchanges and distributions. Were I to make such a case, I would select the notion of fairness in distributions or distributive justice—as the one most applicable to legal services, and the profession's formal commitment to make them "fully available."

Thus, a major problem in Smith's argument stems from a failure either to distinguish between notions of justice or to use one of them systematically to make his point. If his urgings appeal at all to the moral conceptions and criteria of justice, they do so only implicitly—and then only to some undeveloped notion of justice as reciprocity or fairness in exchanges.[38] These appeals can be inferred

---

[37]*See* G. OUTKA, AGAPE: AN ETHICAL ANALYSIS 44-54 (1972).

[38]It is quite possible that in mentioning reciprocity Smith is not giving a justification for a particular duty, but rather is suggesting reasons why one ought to be moral. Rather than using a notion of reciprocal justice (and its principles) to justify a particular claim, he may be making a case for the return expected from being moral. If so, then the reciprocation of "good turns" done to others is what he has in mind, and that

from his arguments that freely donated legal services will yield satisfying personal and social dividends—or, something in exchange for something else. In the inference drawn from Smith's argument is a less relevant and cogent notion upon which to build a case for beneficence as fairness. If we perceive that some common or public set of goods should be distributed, and that everyone, or some professionals in particular, have a duty to see that distribution effected, then it is a mistake to select the notion of justice as reciprocity or that of fairness in exchanges as the conception upon which to make such a case. Even granting, as we must, the cultural persuasiveness of reciprocity notions in the United States, such conceptions are not nearly as applicable as are notions of distributive justice. Thus, Smith's case for the obligation to fairly distribute legal services rests not only upon less rationally demonstrable justifications but also upon a less applicable and less accurate conception of justice.

Fairness to Smith, however, requires some further elaboration of the comment that his notions and justifications are culturally persuasive in America. Even more so than at the present, there was, in Smith's time, a strong predilection for highly motivational and idealistic appeals for charity. As in his argument, most such appeals relied heavily on supporting "reasons" which were more intuitive than demonstrable and which tended to confuse benevolence (good willingness) with beneficence (good action). Thus, Smith's argument would have been conventional and, therefore, more persuasive in the short run among those whose moral sensibilities were akin to his. His argument, however, was culturally relative and *dependent* upon the particular impulses of a particular audience.

That Smith made an argument that fit the conventions of his day is not surprising, but the tenaciousness of such arguments in today's discussions of responsibility for the public interest is somewhat shocking. For example, in a statement entitled "Professional Responsibility," the 1958 Report of the Joint Conference of the American Bar Association and the Association of American Law Schools, the writers reiterate the obligation to make legal services available to all citizens but do so in the traditional terms of sentiment and voluntarism. After suggesting that the mechanisms by which to assure this service are of secondary importance, they maintain, "It is of great importance, however, that the *impulse* to render this service, and the plan for making that impulse effective, should arise within the legal profession itself."[39] This statement not only

---

is sometimes given as an answer to the question, "Why be moral?" and not to the question, "How to justify this alleged duty?"

[39]*Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1216 (1958) (emphasis added).

echoes the sentiments of Smith, but also indicates the tenacity and continuing impact of his perspective and set of premises regarding legal aid. Some reasons for this tenacity are found, in part, in the interdependence of elective benevolence and judgments about the adversary system as well as about the criteria of professional responsibility—two sets of judgments we shall now examine.

II. "Pro bono": A By-product of Adversarial Representation

It may seem paradoxical to suggest that professionals whose daily business requires the skillful and zealous representation of clients in the pursuit of civil justice may, by advancing this cause, simultaneously serve to undermine it—at least in its broader social and political potential. The vigorous promotion of one kind of justice may work against and at times be diametrically opposed to other important and interdependent species of justice.

This paradox may elicit a number of standard retorts which, as I shall demonstrate, neither explain the puzzle nor offer grounds sufficient to resolve it in the future. For example, one might say that lawyers cannot and ought not to work simultaneously on every front in the effort to build a more just society and that no profession ought to be given responsibility for goals to which their specific skills are related only tangentially or indirectly. Lawyers, after all, are neither social workers nor philosophers. As attorneys, they are required only to represent clients by taking one side in a legal conflict and helping that side "win" (and, by so doing, to help preserve clients' confidence in the system, as well as the jobs for which they trained). Thus, one plausible retort is to claim that in order to do the job expected of legal counsel well, the lawyer can ill afford to be looking over his or her shoulder at the effects this zealous advocacy may be creating on other people and institutions. And it seems sensible that some should believe that advocacy is itself for the benefit of the common good or public interest.

Beliefs such as this could and did remain largely tacit in the early and middle years of the legal aid movement: from the 1910's through the 1950's. The assumption that zealous and partisan advocacy of one individual's interests automatically transfers to the public benefit and serves the common interests of all went unchallenged until the 1950's. In 1952, however, members of the Joint Conference on Professional Responsibility found the adversary system to be the major obstacle both in efforts to understand the lawyers' professional responsibility and in the communications they initiated between lawyers and the professional philosophers and theologians

participating in the conference.[40] Conceding the difficulties of explaining the system's benefits to students as well as to colleagues from other disciplines, and acknowledging that lawyers are not generally very "philosophic" about the system, the co-chairmen reported the major conclusion of the conference as a judgment that the "first need was for a reasoned statement of the lawyer's responsibilities, set in the context of the adversary system."[41]

Arguing that "[t]here is a sense in which the lawyer must keep his obligations of public service *distinct* from the involvements of his private practice,"[42] but that the latter can be truly a form of public service, the writers illustrated their thesis first with an example drawn from the life of barrister Thomas Talfourd and then with a catalog of attitudes which they considered characteristic of a truly public orientation in private advocacy. Talfourd helped a client win a suit in a case in which he judged that the law that favored his client's cause was, nonetheless, immoral. Later, as a member of Parliament, he helped secure passage of a statute which revised the previous immoral law. His work as barrister is depicted as one which embodies the characteristics of an enlightened, skillful awareness of the broader public issues and responsibilities facing the profession. Using Talfourd as a model of the kind of private practice which is deemed to be inevitably a form of public service, the writers characterized this practice as one which is animated by a "sense" and "appreciation" of public service as well as by actions which "advance" and "facilitate" rather than "obstruct" the channels of "collaborative effort."[43] These hallmarks are interconnected with affirmations of the importance of the "impulse" to render services to all who need them, and are interrelated with an obligation to represent publicly unpopular clients or causes while asserting that this duty is one of the "highest services a lawyer can render to society."[44]

The explanation of this latter duty as one which rests finally upon a decision of the "individual conscience" but one which is a "clear moral obligation . . . of the legal profession as a whole,"[45] is a very significant and seemingly essential judgment at the heart of the Conference's views of the public value of the adversary system, and is one which will be discussed more fully in the following section. For the moment, however, I should like to appraise critically

---

[40] *Id.* at 1159.

[41] *Id.* (The co-chairmen were Lon L. Fuller and John D. Randall.)

[42] *Id.* at 1162 (emphasis added).

[43] *Id.*

[44] *Id.* at 1216.

[45] *Id.* at 1217.

some of the moral premises which can be inferred readily from the Joint Conference's interpretation of pro bono as a product of the adversary system.

Just as in the case made by Smith, the terms of the argument are highly ambiguous and appeal primarily to intuitions, sentiments, and attitudes. Hallowing the tradition of the "ethics of virtue," the Conference's statements tend to foreclose upon the possibility of gaining the precision necessary for more demonstrable and more completely "independent" moral criteria. Again, just as with Smith, the obligation for public service is made to rest finally upon the decisions of individual lawyers, but in such a way that they are given no specific direction in the form of decision or action-guiding criteria of fair distribution. In fact, they are told, paradoxically, that the representation of unpopular clients or causes is a moral duty of the profession *as a whole.*

Because this latter paradox will be discussed in a later section, I concentrate here on the lack, or at least the apparent absence, of criteria for the fair distribution of legal services. The failure even to mention moral criteria for fairness in these distributions rests in part upon a set of interrelated assumptions. One is that ethical appeals for public service ought to ask only that lawyers do their jobs well, assuming this will redound to the public interest. This assumption entails the implication that the skillful advocacy of one client's interests transfers to outcomes which serve the common good, or, put differently, that when law is well practiced, the public "chips" of zealous advocacy will fall automatically and correctly in the interests of all. A second assumption concerns the nature of ethics and seems to imply that moral action-guides are finally and fundamentally only ideals put before individuals who must decide how "high" they wish to reach. This assumption belies a commitment to a theory of perfectionism and perhaps a purely private conception of morality—implying that there are no social-ethical action-guides which are both publicly debatable and capable of guiding the behavior of social institutions, as policies to be honored in the actions of individual agents. There is yet a third, and perhaps largely tacit, assumption related to the implication of the adversary system that lawyers are free to choose their clients and cases and that they will make these selections on the basis of several interrelated factors—such as the likelihood of winning the case, the economic payoffs, and the public renown anticipated. This tacit assumption, furthermore, is to be inferred from the fact that, when discussing public service in the context of the adversary system, the Joint Conference offers no specific guidelines for fair distribution and employs only aspirational and attitudinal suggestions for individual decisions.

I believe that there must be other, more determinate, and possibly more influential, criteria which function to fill this vacuum, and upon which the individual lawyer might be able to decide and act with a measure of certainty.

We do not have to look very far to discover the possibility that this third and tacit assumption is allied to a set of criteria by which individual lawyers are guided and by which they make decisions on the basis of at least one kind of distributional criteria: minimum fee schedules. As Barlow Christensen suggests, these schedules function to determine both what is "ethically acceptable" and what is "in the public interest."[46] If "ethically acceptable" means customarily acceptable, and "public interest" means that the public has a need for the profession and that it cannot sustain itself unless it occupies a sound economic position, then the function assigned these fee schedules may be built on sound ethical reasoning. If not, the grounds are spurious to say the least. Nonetheless, and this is the main point, where moral criteria for fairness in these distributions seem to be rationally necessary there may be a functional substitute for them—namely, economic criteria. Fixed fees, determined by bar associations at the local and other levels are not moral criteria, unless the "ersatz" is to be equated with the "genuine." Still, they may be perceived as moral or "ethical," co-opting consideration of the more specifically moral criteria of equality and fairness in distributions. Recalling comments regarding the influence of business on the bar and made by Louis D. Brandeis,[47] economic criteria imply more than a narrow vision of professional responsibility, the adversary system, and the means necessary to protect the private bar. They imply as well a first-class confusion about the meaning of "ethical," and ambiguity aggravated by the failure to suggest specific moral criteria for the public service of the private bar, and one which seems to be dictated by a compulsion to defend the adversary system against all odds.

In this connection we must consider still another major factor in the statements of the Joint Conference: the assumption that there is a split, perhaps even a dichotomy, between the *private* and the *public* bars. At least a mental distinction can be seen in a previously cited proposition—"[t]here is a sense in which the lawyer must keep his obligations of *public* service *distinct* from the involvements of his *private* practice."[48] Partaking, perhaps, of a perspective which,

---

[46]B. CHRISTENSEN, *supra* note 9, at 56-57.

[47]F. MARKS, *supra* note 17, at 28 n.48 (citing L. BRANDEIS, BUSINESS—A PROFESSION 318, 321 (1914)).

[48]*Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) (emphasis added).

as mentioned above, maintains a too rigid dichotomy between the personal and the social in ethics, there is an additional and historically very influential source of a similar dichotomy between the social structure and the *ethos*[49] which characterizes the private bar and that which is the hallmark of the public bar.

Such a source can be found readily in the socialization and values historically transmitted by training in the common law tradition. With an emphasis on precedent, and upon what one writer calls the "relentless doctrinal analysis of appellate opinions . . .,"[50] the range and depth of inquiry becomes restricted in the common law tradition, with the results that broader social issues hardly can be considered and professional adaptation to changing social needs or alternative methods of conflict resolution is hampered. In a professional environment which rewards craft over choice and process over purpose, it would not be difficult for the individual lawyer to come to believe that the proper decisions in cases are simply those which the system produces.[51] With little opportunity and increasingly less skill in asking whether or not there might be other rules which are also applicable—moral ones, for instance—or which ought to override the procedural rules of the common law method, the lawyer could become morally myopic. It could become second-nature to disown the results, to become committed to process over substance, and to be animated by the functional equivalent of a rationally justifiable moral system—by an *ethos*, and, in this case, one with almost "religious" or unhesitating faith in the centrality of the common law method in democratic systems of civil justice.[52]

Some maintain that these convictions have animated the *private* bar since 1870, that they are institutionalized in the case method of teaching, but that they also impede the private lawyer's capacity to deal with contemporary social, economic, and political issues.[53] In 1888 and 1905 respectively, Lord Bryce and Louis D. Brandeis targeted this incapacity as one of the major causes in the decline of the public influence of the American bar.[54] However, with the dawn of the era of governmental regulation and dispensation of powers, there also arose a new cadre of specialized professionals—government lawyers—or the beginnings of a "public" bar dedicated to

---

[49]*Ethos* is used here to refer to the subtle web of values, meanings, purposes, expectations, obligations, and legitimations which constitute the *operating* norms of a culture or one of its sub-groupings.

[50]J. AUERBACH, *supra* note 18, at 276.

[51]Stone, *Legal Education on the Couch*, 85 HARV. L. REV. 393-94 (1971-1972).

[52]F. MARKS, *supra* note 17, at 27.

[53]*Id.*

[54]*Id.* at 27-28.

public service, and "charged" with representing the whole profession's concern with public policy. The private bar did not fail entirely in helping to draft legislation or in conducting investigations and hearings on public matters. But when they did, it was in behalf of the interests of their individual business clients. Similar tasks, done primarily for more common interests, were assigned to the public bar, which, therefore, became more completely responsible for the bulk of the legal profession's activities in public policy discussions and decisions.[55] Thus, the public bar developed a "conscience—or policy-laden" *ethos*, which was competitive with that of the private bar. Applauded by figures like Brandeis, but a source of chagrin for a figure like Abe Fortas, the public bar emerged to focus attention on and to stimulate debate about public interest issues.[56] Nonetheless, and despite its public-interest character, the existence of a public bar separated from the private bar served to obscure the fact that all legal professionals have responsibility for the general welfare. As late as 1967 at a Harvard Law School conference, Justice Brennan stated that a certain amount of "shuttling" between public service and private practice should be encouraged to increase the "cross-fertilization" of each group by the respectively different perspectives and talents they cultivated.[57] This had already begun under the auspices of the Legal Services Program, a program which involved the private sector significantly in the creation and control of its policies and organization—especially through the involvement of the local bar associations.[58] This cross-fertilization has also begun to occur in some quite different and as yet unpredictable ways through the public interest commitments of some private law firms, and in some experimental forms of open-panel group practice.[59] But it is still too early to know whether or not the profession will be able to shed easily the accumulated burden of a somewhat schizophrenic split between the public and private bars, their differing social structure and *ethos*. Clearly such a move will be most dif-

---

[55]*Id.* at 25-26.

[56]Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970); F. MARKS, *supra* note 17, at 34.

[57]Brennan, *The Responsibilities of the Legal Profession*, in THE PATH OF THE LAW FROM 1967, 96-97 (A. Sutherland ed. 1968).

[58]F. MARKS, *supra* note 17, at 42.

[59]"Open-panel" refers to experiments in which members of group plans may select lawyers other than those regularly employed by the group. If the latter were the only alternative, the designation would be "closed-panel." "Unpredictable" in this same statement refers to a judgment that, with respect to funding and organization as well as the causes of their beginnings in private firms, the future of "public interest" members, and departments, is really quite uncertain.

ficult, if not impossible, without simultaneous revisions in related judgments about pro bono as an elective benevolence or as an inevitable outcome in the adversary system. If changes in these judgments are, indeed, essential, I suspect many will conclude that the gravity of the situation is such that the changes cannot be effected without dramatic and far-reaching, and undesirable consequences on the public shape and functions of lawyering.

III. "Pro Bono" in Cannon Two

The following comment by Andrew L. Kaufman helps explain the considerable attention I gave to the Joint Conference in the preceding section. The statement also creates a setting in which to grasp more firmly my appraisal of the bar's judgments of public service and the public interest as found in the Code.

> The Statement of the Joint Conference on Professional Responsibility of the Association of American Law Schools and the American Bar Association . . . is offered as an institutional view of the lawyer's role in the legal system. If one were vilifying it, one might call it the "establishment" view. If one were lauding it, one might call it a statement representing a consensus of the views of progressive leaders of the profession about its highest ideals. However one characterizes it, the Statement *is often looked to* when professional ideals are sought or questioned, and it is also useful as a foil against which to test one's own thoughts.[60]

Kaufman helps set the stage for the declaration of a set of premises which will guide the following critical analysis of Canon 2. My analysis presupposes that the Code is a product of the hopes and fears of a nationally influential cadre of leaders in the American bar. But, differing somewhat from the laudatory view mentioned above as one possible interpretation, I do not assume that this leadership is necessarily progressive, at least not entirely and unambiguously so. I further presuppose that the ideas of Lon L. Fuller and Henry S. Drinker have greatly influenced the leadership and that their views were incorporated in the Code.

I also assume that, irrespective of whose thoughts it incorporates, the Code is an imperfect mirror of what *all* lawyers hold to be morally binding. And this I believe for two reasons. First, the Code is not binding on all lawyers unless ratified by state bar

---

[60] A. Kaufman, Problems in Professional Responsibility 1 (1976) (emphasis added).

associatons.[61] Second, even if ratified in its entirety, there is always a measure of selectivity and inconsistency in local interpretations and applications of the disciplinary regulations. In fact, it would appear that only a select set of the most flagrant violations results in disbarment. In the recently quoted view of Eric Schnapper:

> One searches in vain for a lawyer disciplined for failing to give free legal service to the indigent, for failing to disclose legal precedent contrary to his clients' interests, for misrepresenting facts to judges, juries or opposing counsel, or for using political office or connections to attract clients, although the frequency of these occurrences is common knowledge.[62]

Finally, in what follows, I assume that, irrespective of whose thoughts it incorporates and whose interests it promotes and the degree of adherence which local bars accord it, the Code is designed and used as the major and formal educational tool both for the teaching and for the sanctioning of a professional *ethos*. Hence, the Code merits careful and critical attention, and, in particular, scrutiny of the moral ideals (ethical considerations) and the disciplinary rules with which the bar seeks to enforce a certain minimum achievement of professional standards. Because the subject of this Article is the profession's institutional understanding of the pro bono requirement, I shall focus critically upon the reasons why the Code's Canon 2 may lead logically and inevitably to one of the inconsistencies Schnapper underscores—namely, the vanity of searching for an instance in which a lawyer is disciplined for failing to make legal services available to one who needs but cannot afford them.

Certain terms and conditions are imposed upon the Code's interpretation of pro bono—by virtue of historically influential thought patterns and by commitments to elective benevolence and to the adversary system as the principal instruments by which to assure adequate service of the public interest. Some of the still-influential ideas and values of the profession's historical past are tantamount to being shibboleths or social atavisms. The preference for explaining public obligations in terms of traditional notions of elective benevolence and the adversary system are clearly examples of just such an ideological residue. But so too are the Code's conceptions of

---

[61] *Id.* at 29. Note that there is "Some evidence that a counter-bar association is emerging to perform the central function of brokering professional responsibility. The Chicago Council of Lawyers typifies such a counter-bar." F. MARKS, *supra* note 17, at 147.

[62] TIME, Apr. 10, 1978, at 56, 59.

ethics and what is "ethical" in the considerations which precede each set of disciplinary rules. In other words, there are limitations set by the very notions essential to the structure of the Code—that is, some general and guiding principles which run through the entire Code.

Invoking clarifications and precisions suggested earlier in this Article, I should like now to discuss several mistaken, or at least highly ambiguous, moral notions which form in the structural glue of the Code. In preparing the new Code, adopted in 1969, the Committee sought to include areas previously omitted or only partially treated, to clarify editorially some previous statements, to add new propositions with which to address the peculiarities of modern society, and to provide more practical and effective sanctions than were available previously.[63] It divided the Code into *Canons* (axiomatic norms), *ethical considerations* (ideals or goals which are "aspirational in character") and *disciplinary rules* (mandatory minimum standards of duty).[64] In reaching toward its objectives and in so dividing the contents of the Code, however, the Committee created a number of potentially serious confusions. It identified the "ethical" with the "aspirational," the idealistic, or the "ethics of virtue." Similarly, it equated "duty" with "disciplinary rules" and, therein, risked a double subordinate ambiguity. Determinate obligations are confused with statutory rules, thus, blurring an important distinction between law and morality; they also confuse custom and morality and tend to equate the profession's traditional, conventional and customary *ethos* with rationally justifiable moral rules. Seeming to pay little or no attention to professional ethicists' explanations of the rules for moral rules ("ethics"), the Committee improved the form and content of the 1908 Code, but simultaneously undermined the content of the new version by failing to substantially incorporate the efforts of contemporary ethical scholarship to clarify necessary distinctions between law, etiquette, morality, and ethics.

The Code's confusion of moral and nonmoral action-guides is aggravated by a still more puzzling theory of morality which distinguishes aspiration and duty rather stringently and becomes the structural skeleton to be fleshed out in ethical considerations and disciplinary rules. The preface declares that the committee "relied heavily upon the monumental *Legal Ethics* . . . of Henry S. Drinker, who served with great distinction for nine years as Chairman of the Committee on Professional Ethics (known in his day as the Committee on Professional Ethics and Grievances) of the

---

[63] ABA CODE, *Preface* at i (1977 version).

[64] *Id., at Preliminary Statement* at 1.

American Bar Association."[65] Careful scrutiny of Drinker's book, however, reveals nothing comparable to the Committee's theory of morality.[66] Drinker's primary contributions seem to have been his useful and abundant catalogue of American Bar Association "Opinions" on ethical problems in professional conduct and in his correlation of these opinions with the 1908 Canons which provide a comprehensive and systematic record of the revisions that changing social and cultural conditions had prompted between 1908 and 1953.[67] This realization of Drinker's contribution created some curiosity about the source of the moral theory and was preface to an hypothesis which emerges from two interrelated sets of facts. First, the footnotes to the Code demonstrate that the Committee relied heavily upon the Statement of the Joint Conference on Professional Responsibility. This Statement is cited, for example, in three of twelve footnotes for the Preamble-Preliminary Statement which establishes the focus of the Code, and is cited four times in support of Canon 2's ethical considerations.[68] Second, if we recall that Lon L. Fuller was one of the co-chairmen of that conference and that the concluding peroration of the Statement appeals for more than understanding—namely, for "a sense of attachment to something larger . . . habitual vision of greatness"[69]—we can infer that Fuller's perspectives influenced the drafting of the 1969 Code. The most persuasive piece of evidence in support of such an inference is Fuller's 1964 publication *The Morality of Law.* First published in the year of the drafting committee's preliminary deliberations, this book elaborates the very same theory found in the structural standpoint of the Code—a morality of aspiration as distinguished from one of duty.[70] Therein Fuller maintained that duty embodied the basic minimum and the most obvious demands of social life.[71] By contrast, he portrayed aspiration as the way of perfection, excellence, or the form of morality calling for the fullest realization of human powers.[72] Considering the morality of duty as one which entails prohibitory and somewhat inflexible but enforceable action-guides, he maintained that the morality of aspiration embodies affirmative, more pliable but nonenforceable guides and is, therefore, more completely subjec-

---

[65] *Id., Preface* at i.

[66] *See* H. DRINKER, LEGAL ETHICS (1953).

[67] *E.g., id.* at 257-59 (on advertising and solicitation).

[68] ABA CODE, *Preamble & Preliminary Statement,* n.n.3, 4, 7, EC 2-1 n.4, EC 2-25 n.40, EC 2-27 n.45, EC 2-30 n.51 (1977 version).

[69] *See* A. KAUFMAN, *supra* note 60, at 28.

[70] L. FULLER, THE MORALITY OF LAW 3-32 (2d ed. 1969).

[71] *Id.* at 5-6.

[72] *Id.* at 5, 6.

tive and intuitive,[73] *i.e.*, it is less determinate and demonstrable and is more completely dependent upon variables.

I have indicated earlier some of my reasons for judging that dependent moral criteria are less justifiable than others; I shall, therefore, now forego all but the briefest comment on Fuller's theory and shall focus, rather, upon how this theory gives structural coherence to a host of ambiguous and unjustifiable claims in Canon 2, the public interest canon. In addition to critical comments made earlier regarding indeterminancy in aspirational, perfectionist and intuitionist forms of ethics, I supplement those comments here by indicating some further problems in Fuller's theory, particularly its tendency to skew Canon 2's account of the lawyer's public responsibilities. In particular, I note the unsatisfactory character of a distinction between maximums and minimums in morality especially when they are correlated with aspiration and duty—as if excellence and virtue may not be considered duties, or conversely, as if a person cannot aspire to the fulfillment of moral duties. Furthermore, the equation of aspiration with positive obligations and of duties with negative prohibitions misses the fact that ordinary usage most often confines duty to an affirmative action and that philosophers rightly distinguish between moral duties and moral prohibitions. Finally, excellence and its corresponding ideals ought not to be restricted solely to the guidance of *personal* ways of life as implied by a morality of aspiration. They can and should apply as well to *social* ends such as justice, equality, peace and so forth.[74]

Because of the Committee's preference for the theory of morality articulated in the Preamble-Preliminary Statement, and because it used this theory to structure the content of Canon 2, the Code's judgments about professional obligations to serve the public interest partake of all the ethical problems embodied in the prefatory general theory. For example, Canon 2's disciplinary rules carry forward traditional forms of etiquette concerning professional notices, letterheads and offices, solicitation, and the recently-amended section on publicity.[75] These are not properly called "moral duties." They may well be obligatory for the professional, but they are decidedly nonmoral and have only the most tenuous connection to the Canon's ethical considerations which, according to the Code's Preliminary Statement, "constitute a body of principles upon which the lawyer can rely for guidance in many specific situations."[76]

---

[73] *Id.* at 30-31.

[74] *See* a similar assessment in Summers, *Professor Fuller on Morality and Law*, in MORE ESSAYS IN LEGAL PHILOSOPHY 104-10 (R. Summers ed. 1971).

[75] ABA CODE, DRs 2-101 to 104 (1977 version). DR 2-101 has been revised substantially due to the decision in *Bates*.

[76] ABA CODE, *Preliminary Statement* at 1 (1977 version).

The disciplinary rules guide professional activity by means of mandatory standards the violation of which risks disciplinary sanctions, but they fail to mention, much less sanction, a mandated minimum for the public service set forth in the "principles" mentioned above. Hence, discipline of a lawyer for failing to make legal services fully available is unlikely. Consequently, the public service obligation rests completely upon the "principles" set forth in the "ethical considerations." Thus, the nature of those principles and their potential for effectively guiding professional activity toward greater public responsibility must be questioned.

The maxim in Canon 2 contends: "[A] lawyer should *assist the legal profession* in fulfilling *its duty* to make legal counsel available."[77] I grant that the ethical considerations following this maxim seek to expand upon this obligation and maintain that it entails helping to educate people to recognize legal problems and to select lawyers intelligently as well as the duty of professionals to represent socially unpopular clients and causes. Nonetheless, the availability mentioned in the Canon is associated principally and recurrently with the business of "making legal services fully available"[78] to "persons unable to pay reasonable fees."[79] Having made all of these points, however, the Canon modifies the initial maxim to read: "The basic responsibility for providing legal services for those unable to pay *ultimately* rests upon the individual lawyer . . . ."[80]

To grasp the implications of this transmutation—*from* assisting the profession in its responsibility *to* accepting what is fundamentally a personal obligation—two things should be recalled. First, no disciplinary rules correspond to this ethical consideration; thus, in accordance with the moral theory structuring the Code, there are no mandatory and minimum *duties*, *i.e.*, transgression is not subject to sanctions. Second, the Code's ethical considerations are "aspirational," and the obligation to help the indigent is sandwiched between statements reminding lawyers, on the one hand, that this need has been met historically by means of donated services and, on the other hand, that such benevolence is often not sufficient and must be supplemented with organized efforts to which lawyers should lend support—but only if they are "proper" and if participation in them upholds "the basic tenets of the profession: independence, integrity, competence and devotion to the interests of individual clients."[81]

---

[77] *Id.*, Canon 2.
[78] *Id.*, EC 2-1.
[79] *Id.*, EC 2-25.
[80] *Id.* (emphasis added).
[81] *Id.*, EC 2-33.

The lawyer is given a very confusing and somewhat contradictory set of standards to follow in pursuit of public responsibility. The profession is said to have a duty in the fulfillment of which the lawyer must assist, but only and finally by striving for personal virtue in benevolent altruism which is called "one of the most rewarding experiences in the life of a lawyer."[82] Precisely how or why the individual lawyer is a representative of the whole profession in accepting or refusing any particular opportunity to be benevolent is not clear. Should a particular lawyer or group of them find this kind of altruism not very "rewarding" finally, then the major and consequence-based form of justification for the duty alleged is undermined by contradictory empirical evidence. Should cooperation with agencies which regularly provide free or reduced-fee legal services appear to conflict with the very indefinite or indeterminate traits of independence and integrity—and such conflicts would not be hard to imagine when the traits are so relative—then the latter and characteristic virtues are to have priority over the putative public need. Indeterminacy in locating the subject and the grounds of the obligation is coupled with a corresponding indefiniteness in the characterization of ideal traits which are to take precedent over public service obligations. Thus, the ethical considerations are little more than prayerful suggestions, optatives rather than imperatives. They are by no means prescriptive and, in their indeterminancy, are surely not universalizable or generalizable. Failing most of the conventional tests of moral rules and wanting as they are in corresponding mandates, *i.e.*, disciplinary rules, the "standards" of Canon 2 are little more than pious platitudes. This is not surprising in view of the historically important and still influential precedents of the profession's conceptions of public service.

Having previously discussed Smith, Pound, and Fuller as precedent-setting figures, I mention here only one other, the authority whose voice is acknowledged in the preface to the Code: Henry S. Drinker. In his book's very brief remarks about public service, Drinker recalled Pound's definition of a profession—characterized among other things by a dedication to the public interest—and he invoked tradition as a support for the public obligation and concluded that this is "[a] duty . . . of which the emolument is a by-product, and in which one may attain the highest eminence without making much money."[83]

After Drinker's 1953 rhetorical appeal supporting the 1908 Canon 4 which upheld a duty toward the indigent, a series of events

---

[82] *Id.*, EC 2-25.

[83] H. DRINKER, *supra* note 66, at 5.

and movements in the 1960's pressured the bar to remove obstacles to equal opportunity and to make the legal redress of violated rights more accessible to people "closed out" by the system.[84] Thus, greatly expanded and updated in form and content, Canon 2 of the 1969 Code was launched in response to rapidly occurring and highly charged social, political, and cultural changes. It has been buffeted about in the 1970's and was central to a series of challenges to the adversary system coming from experimental public interest law practice and zealous class-action advocacy, and has been the principal casualty of the storm which preceded a series of four amendments to the Code—one every year since 1974, with the most recent being the 1977 Supreme Court decision on advertising.[85] And, by virtue of related and continuing tensions in these areas, Canon 2 promises to be at the center of any number of socially and professionally threatening squalls for some time to come. One very good reason for this supposition is to be found in the very difficult dilemma at the heart of the recent decision concerning advertising of legal services. The disciplinary rules on "Publicity in General" and their supporting ethical considerations had, prior to amendment, prohibited all but the most circumspect advertising of legal talents and services, restraining competition from customary forms of open-market business and trade.[86] Prior to the 1977 amended version of the 1969 Code, Canon 2 maintained that this traditional ban was "rooted in the public interest"—oddly enough the only place this interest is mentioned in the entire Canon—and claimed that competitive advertising would impair public confidence in the legal system as well as undermine the uniqueness of the lawyer-client relationship.[87] Disputing this reasoning in its decision, the majority of the Supreme Court held that it was anachronistic to believe that the profession was somehow above trade and a free-market economy.[88] The Court, thus, landed a major blow against a long-standing and very pliable interpretation of Roscoe Pound's definition of a profession; the public interest component of the definition had been interpreted in such a way that it meant in effect aristocratic and elitist self-service fortified by an array of rules of etiquette which served anything but the public welfare.

---

[84]*See, e.g.*, J. AUERBACH, *supra* note 18, at 263-306; H. STUMPF, COMMUNITY POLITICS AND LEGAL SERVICES: THE OTHER SIDE OF THE LAW (1975).

[85]*See* ABA CODE, *Preface* at ii.

[86]*Id.*, ECs 2-9, 2-10, DR 2-101 (1975 version).

[87]*Id.*, EC 2-9.

[88]Bates v. State Bar, 433 U.S. at 368-69 (citing B. CHRISTENSEN, *supra* note 9, at 152-53).

The full impact of the Court's decision cannot be estimated for sometime. In particular, it would be reckless to suggest that the encouragement of a business *ethos* in the legal profession would illumine the blind spots or eradicate the errors in a traditional *ethos* grounded more in custom and convention than in rationally justifiable moral arguments for fairness in the distributions as well as the exchanges of professional services. What has not been true in the business world is not likely to become true in a business-minded legal profession. Nonetheless, as Raymond F. Marks has suggested, it is paradoxical but logical that:

> [I]t was when the bar acted more like a trade association than a profession [with the adoption of minimum-fee schedules] that it was forced for the first time formally to take cognizance of the problems of making services available to some by means other than a market-model for distribution of these services.[89]

IV. THE "IS-OUGHT" MAZE

Canon 2 has become the repository of the profession's traditional and ambiguous judgments about the obligation to serve the public interest and, therefore, a potential target of dissatisfaction with those judgments. As a repository of traditional conceptions, it is a microcosm of the cultural lag identified by participants in the most recent joint meeting of the American Bar Association and the American Assembly.[90] This disparity between inherited norms and the present realities is encouraged by certain habits of legal institutions: their orientation toward the past through dependence upon precedent, previous legislative enactments and judicial interpretations. Furthermore, as our pre-eminent system of social symbols, the law tends to reinforce cultural beliefs which have proven to be dissonant with contemporary experience. For example, the law can become a pedagogue for the beliefs, attitudes and values of adversarial conflict and others which are incompatible with the reality of an interdependent, vulnerable and technological world.

One of the causes of "cultural lag," is to be found in what Julius Stone has discussed as an assumption that de facto beliefs are conclusive of what ought to be.[91] Called by moral philosophers the naturalistic or "is-ought" fallacy, this assumption is a culturally obstinate way of proceeding from assertions of what is to claims about what ought to be. Thus, what merely happens to be the cur-

---

[89] F. MARKS, *supra* note 17, at 16.

[90] M. SCHWARTZ, *supra* note 3, at vii.

[91] J. STONE, SOCIAL DIMENSIONS OF LAW AND JUSTICE 546 (1966).

rent or traditional set of convictions about what is moral can come to be expressed and defended formally as moral principles supported by moral theory. In this fashion, the axioms which a culture or a profession uses to resolve intellectual and moral puzzles and the not-always-morally-justifiable maxims by which we seek to guide social behavior can acquire a somewhat specious intellectual respectability.

Clearly, circumspection and selectivity are in order for those persons who would trade the less-fully-thoughtful and customary standards of a professional *ethos* for more formal philosophies of law and morality. Having already suggested some reasons why the ethical theories of Drinker and Fuller leave much to be desired, I should like, further, to indicate why even the more recent offerings of thinkers like Ronald Dworkin and John Rawls may not resolve fully the is-ought dilemma and why, therefore, their positions may aggravate, rather than relieve, the cultural lag hallowed by the Code and by all who use it as their moral pedagogue.

In his critique of the "ruling theory of law," *i.e.*, contemporary positivist and utilitarian theories, Dworkin reaffirms the common law tradition of rights claimed over and against, but importantly also as prior to, the state and its legislative enactments.[92] Although H.L.A. Hart's "most powerful contemporary version of positivism"[93] is his major target, Dworkin is critically attentive to other recently repopularized forms of Edmund Burke's theory emphasizing the customary or conventional and promoting trust in the established notions and values of our culture.[94] He rightly assails the reasoning in these two theories which would aggravate the confusion of de facto beliefs and normative legal and moral judgments, but unhappily not on that basis. Drawing upon Rawls' technique of "reflective equilibrium,"[95] Dworkin seeks to account for the relationship between prevalent cultural beliefs and formal moral principles. While he has elsewhere differed from Rawls—notably on the matter of a hypothetical social contract and on the priority to be assigned either liberty or equality[96]—he here adopts a technique which overlooks the liabilities inherent in conventional beliefs and social axioms. In the following view of the function of moral philosophy, and then mediating Rawls' views, Dworkin establishes a structural and formal philosophical method for investing some not fully justifiable convictions with the warrant of a formal system—thereby also

---

[92]R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

[93]*Id.* at xi.

[94]*Id.* at x.

[95]J. RAWLS, A THEORY OF JUSTICE 20-22, 48-51 (1971).

[96]R. DWORKIN, *supra* note 92, at 150-54, 272-78.

potentially and geometrically increasing the disparity between inherited values and the judgments necessary to confront contemporary realities.

> It is the task of moral philosophy, according to the technique of equilibrium, to provide a structure of principles that supports these immediate convictions [moral beliefs such as those concerning the injustice of slavery] about which we are more or less secure, with two goals in mind. First, this structure of principles must explain the convictions by showing the underlying assumptions they reflect; second, it must provide guidance in those cases about which we have either no convictions or weak and contradictory convictions. If we are unsure, for example, whether economic institutions that allow great disparity of wealth are unjust, we may turn to the principles that explain our confident convictions, and then apply these to that difficult issue.[97]

Because some of these convictions express judgments about rights prior to legislation or over and against the state, this technique helps advance Dworkin's thesis of taking rights seriously. And because equilibrium requires a series of "back and forth adjustments," now accommodating principles to convictions and again adjusting conversely,[98] there is little likelihood that customary or conventional judgments will reign supreme over more rationally justifiable convictions. With the possible exception of his explanation of "the right to treatment as an equal,"[99] Dworkin's reliance on Rawls' technique sets the stage for an unwitting justification of what are merely de facto beliefs or preferences. Even after granting the critical potential in the seesaw movement of the equilibrium technique, there remain some nagging doubts about public and professional willingness to call into question some beliefs to which are allied very strong interests of a political, economic and personal sort. Furthermore, and in addition to the conative and retentive powers of preferences, loyalties, and interests, there is another source of obstinacy in cultural beliefs. Although Rawls emphasizes the importance of deeply-held moral beliefs,[100] there is always the chance that they may be mistaken. They can be the consequence of oversight as well as insight,[101] the products of a false consciousness

---

[97] *Id.* at 155.

[98] *Id.* at 164.

[99] *Id.* at 273.

[100] *See* Rawls, *The Independence of Moral Theory*, in 48 PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSPHICAL ASSOCIATION 5-22 (1975).

[101] *See* B. LONERGAN, INSIGHT xi, xiv (1958) (on flights from understanding); *id.* at 419-20 (on common sense's encouragement of judgment while discouraging understanding).

as well as its opposite. Irrespective of the depths of their roots or the pervasiveness of their branches, immediate convictions are not always correct. Thus, while differing somewhat from David Lyons' critical review of Dworkin's thesis, and while not sharing Lyons' utilitarian standpont, I agree with the following: "Right and wrong are not subordinate in any systematic way to the moral beliefs that people happen to have," and that such a subordination is implied in Dworkin's thesis.[102]

Neither Dworkin nor Rawls indicates a clear and direct path through the "is-ought" maze. They make decidedly valuable progress beyond Hart's positivism and the repopularized convetionalism of Burke. They also make telling critical points in opposition to perfectionist and intuitionist moral theories, and they advance a persuasive case for basing moral obligations on duties or rights rather than, as do utilitarians, on goals. Nonetheless, and as noted above, there remains at least one way in which this progress can be undermined—namely, by a less than fully thoughtful and critical acceptance of the community's current crop of moral beliefs.

If this Article has accomplished its objectives, it has demonstrated the conceptual and other liabilities inherent in the adoption and canonization of prevalent convictions about the public responsibilities of the legal profession. I have pointed up the historical and precedent-setting sources of pro bono as elective benevolence, its correlation with convictions that the adversary system's pursuit of one person's interests is necessarily in the interests of the collective, and the hallowing of both these convictions in Canon 2 of the Code.

There are other seemingly intractable alliances of cultural and professional beliefs to be considered at another time—namely, convictions about the "deserving poor" and about the public value of "procedural equality." Finally, and drawing upon the conclusions of this Article's more analytical and critical discussion, I hope to develop soon some constructive proposals for the creative reconception of public service and social justice, as well as offer suggestions for the modification of the adversary system and some ideas about how the quality of legal services must be allied more stringently to considerations of their accessibility. This Article serves only to introduce considerations which are preliminary but necessary to an improved understanding of a very complex, but very important set of issues facing the American bar and the public it is licensed to assist in the pursuit of increasingly greater approximations of the ideal of justice.

---

[102]Lyons, Book Review, 87 YALE L. REV. 415, 435 (1977).

Comment

Comparative Fault: A Need for Reform of Indiana Tort Law

*John F. Vargo**

I. INTRODUCTION

For over 160 years Indiana has progressively developed the theory of negligence as a basis of recovery.[1] The expansion of negligence law in Indiana is evidenced by many well-reasoned decisions which have extended beyond negligence and now include recovery for breaches of warranty,[2] strict liability,[3] and various other causes of action in tort.[4] Apart from these highly sophisticated opinions, Indiana is presently in the backwash of tort law. During the last decade, most jurisdictions have developed a more equitable approach to recovery for tortiously-caused injuries through the implementation of the doctrine of comparative fault.[5] Herein I urge Indiana courts to consider seriously the judicial adoption of this doctrine, not because a majority of other jurisdictions recognize the theory, but because of its logical basis and fairness to all parties.

The two major bars to recovery in negligence are contributory negligence and assumption of risk.[6] Both defenses emerged during

---

*Member of the Indiana Bar. B.S., Indiana University, 1965; J.D., Indiana University School of Law—Indianapolis, 1974.

[1]Negligence law in Indiana dates to the early 19th century. *See, e.g.*, Durham v. Musselman, 2 Blackf. 96 (Ind. 1827).

[2]Neofes v. Robershaw Controls Co., 409 F. Supp. 1376 (S.D. Ind. 1976) (discusses the privity requirement of IND. CODE § 26-1-2-318 (1976)). Indiana distinguishes implied warranty actions which are tortious in nature from those which are based upon contract. *See* Vargo, *Products Liability, 1975 Survey of Recent Developments in Indiana Law*, 9 IND. L. REV. 270 (1975).

[3]Greeno v. Clark Equip. Co., 237 F. Supp. 427 (N.D. Ind. 1965). For a discussion of other Indiana cases involving strict liability and other products liability theories for recovery, *see* Vargo, *Products Liability in Indiana—In Search of a Standard for Strict Liability in Tort*, 10 IND. L. REV. 871 (1977) [hereinafter cited as *In Search of a Standard*]. *See also* Vargo, *Products Liability, 1977 Survey of Recent Developments in Indiana Law*, 11 IND. L. REV. 202 (1977) [hereinafter cited as Vargo, *1977 Survey*].

[4]Berrier v. Beneficial Fin., Inc., 234 F. Supp. 204 (N.D. Ind. 1964) (privacy); AAFCO Heating & Air Cond. Co. v. Northwest Publications, Inc., 162 Ind. App. 671, 321 N.E.2d 580 (1974), *cert. denied*, 424 U.S. 913 (1976) (defamation); Helvey v. O'Neill, 153 Ind. App. 635, 288 N.E.2d 553 (1972) (interference with contractual relations); Galbreath v. Engineering Const. Corp., 149 Ind. App. 347, 273 N.E.2d 121 (1971) (extra-hazardous activities, blasting); Dwyer v. McClean, 133 Ind. App. 454, 175 N.E.2d 50 (1961) (malicious prosecution).

[5]Comparative fault and comparative negligence are used interchangeably throughout this discussion. Approximately two-thirds of the states have adopted some form of comparative fault. V. SCHWARTZ, COMPARATIVE NEGLIGENCE § 1.4, at 3-4 (1974 & Supp. 1978). *See id.* at 367-69 app. for a complete list of adopting states.

[6]W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65, at 416 (4th ed. 1971).

the Industrial Revolution as a response to the societal demand for protection of growing industry.[7] With the passage of time, however, it has become apparent to both the lay and judicial communities that contributory negligence and assumption of risk as complete bars to plaintiff's recovery are no longer rational, fair, or needed approaches to tort law.[8] In light of social change, an examination of the historical basis of the twin defenses and a critical evaluation of their continued existence is necessary.

II. CONTRIBUTORY NEGLIGENCE

Contributory negligence, the most common negligence defense, was first recognized in England in 1809.[9] Prior to that time a plaintiff's contributory negligence was not uniformly considered to be a complete defense to his action, and damages were apportioned when both the plaintiff and defendant were at fault.[10] In 1809, *Butterfield v. Forrester*[11] pronounced contributory negligence to be a complete bar to plaintiff's recovery in England. This concept invaded the United States in 1824[12] and, until the mid-20th century, was the law in most jurisdictions.[13]

Contributory negligence is determined by an objective standard based on the acts of the reasonable person of ordinary prudence under like or similar circumstances, with adjustments for certain traditional physical and mental infirmities.[14] Whether the plaintiff has acted for his own protection as the reasonable person would have is determined on the basis of a risk versus utility test. In other words, the interest furthered by the actor is weighed against the probability and gravity of harm to himself.[15] Although it has been contended that contributory negligence is governed by the same tests and standards as negligence, the two principles can be distin-

---

[7]Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973); Prosser, *Comparative Negligence*, 41 CAL. L. REV. 1, 3-4 (1953).

[8]*See* W. PROSSER, *supra* note 6, § 67.

[9]Butterfield v. Forrester, 103 Eng. Rep. 926 (K.B. 1809).

[10]Hoffman v. Jones, 280 So. 2d 431, 434 (Fla. 1973).

[11]103 Eng. Rep. 926 (K.B. 1809). "One person being in fault will not dispense with another's using ordinary care for himself." *Id.* at 927.

[12]Smith v. Smith, 19 Mass. (2 Pick.) 621 (1824).

[13]*See* W. PROSSER, *supra* note 6, §§ 65, 67.

[14]RESTATEMENT (SECOND) OF TORTS § 464, Comments a & b (1965); Wilderman, *Presumptions Existing In Favor Of The Infant In Re: The Question Of An Infant's Ability To Be Guilty Of Contributory Negligence*, 10 IND. L.J. 427 (1935).

[15]United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947); Conway v. O'Brien, 111 F.2d 611 (2d Cir. 1940), *rev'd on other grounds*, 312 U.S. 492 (1941). *See also* Vargo, *The Defenses To Strict Liability In Tort: A New Vocabulary With An Old Meaning*, 29 MERCER L. REV. 447, 449 n.21 (1978).

guished. Prosser stated that negligence is conduct which creates undue risk of harm to others, thus involving a duty towards others; whereas contributory negligence is conduct which creates an undue risk of harm to the actor himself.[16] The burden of proving contributory negligence is on the defendant.[17]

Various explanations for the existence of contributory negligence have been proffered—proximate cause, a penal basis, unclean hands, accident deterrence, and assumption or risk—none of these theories, however, logically justify the defense.[18] Contributory negligence is best explained by Prosser as an "expression of the highly individualistic attitude of the common law and its policy of making the personal interest of each party depend upon his own care and prudence."[19] The doctrine was encouraged by three major factors: Distrust of the plaintiff-minded jurors of the 19th century, the courts' tendency to find a single cause for every injury, and the courts' inability to conceive of a method by which a single injury could be apportioned among the parties.[20]

Used by the courts as a means of controlling jury awards to the plaintiff during the 19th century, contributory negligence was the primary factor depriving the plaintiff of recovery even where his

---

[16]W. PROSSER, *supra* note 6, § 65, at 418.

[17]RESTATEMENT (SECOND) OF TORTS § 477 (1965).

[18]The weaknesses of these traditional justifications are explained by Prosser:

> Most of the decisions have talked about "proximate cause," saying that the plaintiff's negligence is an intervening, insulating cause between the defendant's negligence and the injury. But this cannot be supported unless a meaning is assigned to proximate cause which is found nowhere else. If two automobiles collide and injure a bystander, the negligence of one driver is not held to be a superseding cause which relieves the other of liability; and there is no visible reason for any different conclusion when the action is by one driver against the other. It has been said that the defense has a penal basis, and is intended to punish the plaintiff for his own misconduct; or that the court will not aid one who is himself at fault, and he must come into court with clean hands. But this is no explanation of the many cases, particularly those of the last clear chance, in which a plaintiff clearly at fault is permitted to recover. It has been said that the rule is intended to discourage accidents, by denying recovery to those who fail to use proper care for their own safety; but the assumption that the speeding motorist is, or should be, meditating on the possible failure of a lawsuit for his possible injuries lacks all reality, and it is quite as reasonable to say that the rule promotes accidents by encouraging the negligent defendant.

Prosser, *supra* note 7, at 3-4 (footnotes omitted). *See also* 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 22.2, at 1192-1207 (1965).

[19]W. PROSSER, *supra* note 6, § 65, at 418.

[20]*Id.; see* Malone, *The Formative Era of Contributory Negligence*, 41 ILL. L. REV. 151 (1946) (emphasizing distrust of the plaintiff-minded jury).

fault was slight in comparison with the defendant's.[21] During this period, contributory negligence achieved its societal goal—the costs of accidental injuries were placed on the injured plaintiff, thereby preserving the defendant-manufacturer's needed capital and encouraging the growth of the newly emerging industries.[22]

III. Assumption of Risk

The doctrine of assumption of risk evolved at about the same time as contributory negligence.[23] In its simplest form, this doctrine consists of the plaintiff consenting to undertake a risk, thereby relieving the defendant of his duty towards the plaintiff.[24] This defense requires the plaintiff to have actual knowledge, understanding, and appreciation of the risk he chooses to undertake.[25] In addition, the plaintiff must have viable choices before his conduct is considered voluntary.[26] The defendant has the burden of proving the four essential elements: Knowledge, understanding, appreciation, and voluntariness.[27] Thus, assumption of risk differs from contributory negligence in that the former is subjective and inquires into the individual plaintiff's state of mind, whereas the latter is based upon an objective reasonable man standard.[28] Both defenses are similar, however, insofar as they completely bar a plaintiff's recovery and accomplish the same 19th century social goals.[29]

The rationale of assumption of risk was attacked early.[30] Professor Bohlen, the reporter for the first *Restatement of Torts*, per-

---

[21]W. Prosser, *supra* note 6, § 67, at 433, *quoted with approval in* Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975).

[22]Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973).

[23]W. Prosser, *supra* note 6, § 65, at 416.

[24]*Id.* § 66; Restatement (Second) of Torts § 496A, Comment c. (1965).

[25]Restatement (Second) of Torts § 496D (1965).

[26]*Id.* § 496E (1965). *See also In Search of a Standard*, *supra* note 3, at 893.

[27]Restatement (Second) of Torts § 496G (1965).

[28]*See* authorities cited in note 26 *supra*.

[29]W. Prosser, *supra* note 6, §§ 65, 68; Restatement (Second) of Torts § 496A, Comments c & d (1965). In fact, contributory negligence and assumption of risk have "overlapped" to a large degree. *See* notes 58-62 *infra* and accompanying text.

[30]Bohlen, *Voluntary Assumption of Risk*, 20 Harv. L. Rev. 14 (1906). Many later articles were written which discussed assumption of risk including an excellent symposium in the *Louisiana Law Review*. *See* Greene, *Assumed Risk as a Defense*, 22 La. L. Rev. 77 (1961); Keeton, *Assumption of Risk in Products Liability Cases*, 22 La. L. Rev. 122 (1961); Mansfield, *Informed Choice in the Law of Torts*, 22 La. L. Rev. 17 (1961); Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 La. L. Rev. 5 (1961). Professor James has also severely attacked the defense. *See* James, *Assumption of Risk: Unhappy Reincarnation*, 78 Yale L.J. 185 (1968). *See also* Twerski, *Old Wine in a New Flask—Restructuring Assumption of Risk in the Products Liability Era*, 60 Iowa L. Rev. 1, 4-10 (1974).

suaded the delegates to reject assumption of risk as a defense separate from contributory negligence.[31] After Bohlen's death and after vigorous debate among legal scholars,[32] the *Restatement (Second) of Torts*, with the encouragement of Dean Prosser, adopted specific sections recognizing the defense.[33] The *Restatement's* adoption of assumption of risk, however, did not end the debate over whether it should be considered separate from either contributory negligence or the duty element of negligence.[34] Recent court decisions and statutes have severely limited or abrogated assumption of risk as a defense.[35]

An excellent example of the restriction of assumption of risk is the Florida Supreme Court decision in *Blackburn v. Dorta*,[36] wherein assumption of risk was merged with the defense of contributory negligence. The *Dorta* court refused to address the area of express assumption of risk and dealt only with implied assumption of risk, which it divided into two categories—primary and secondary.[37] Primary assumption of risk merely means that the defendant either owed no duty or breached no duty. Therefore, as a duty issue it has no useful purpose as a separate defense.[38] Bifurcating secondary implied assumption of risk into *pure* and *qualified* assumptions, the *Dorta* court said that the pure variety consisted of reasonable conduct, whereas qualified assumption of risk consisted of unreasonable conduct of the plaintiff in consenting to the risk.[39] An example of pure assumption of risk, according to the courts is where the plaintiff rushes into a burning building to rescue a child and is injured in the process. Under prevailing law prior to *Dorta*, the plaintiff would have been barred from recovery because he voluntarily exposed himself to a known risk notwithstanding the reasonableness of his conduct under the circumstances.[40] The *Dorta* court rejected pure assumption of risk because of its harsh results.[41] An example of qualified assumption of risk is the same plaintiff attempting to

---

[31]Twerski, *supra* note 30, at 4-10. *See* RESTATEMENT OF TORTS § 893 (1939).

[32]Twerski, *supra* note 30, at 4-10.

[33]RESTATEMENT (SECOND) OF TORTS §§ 496A-G.

[34]*See* James, *supra* note 30; Twerski, *supra* note 30.

[35]For a thorough breakdown of the case law and statutory treatment of assumption of the risk, see Brown v. Kreuser, 560 P.2d 105, 107-08 (Colo. App. 1977); Blackburn v. Dorta, 348 So. 2d 287, 289 n.3 (Fla. 1977).

[36]348 So. 2d 287 (Fla. 1977).

[37]*Id.* at 290.

[38]*Id.* at 291.

[39]*Id.*

[40]*Id.* (construing Morrison & Conklin Const. Co. v. Cooper, 256 S.W.2d 505 (Ky. 1953)).

[41]348 So. 2d at 291.

rescue his favorite fedora from the blazing premises. Under these circumstances the conduct of the plaintiff is unreasonable and can be characterized as contributory negligence. Thus, according to the *Dorta* court, assumption of risk can be completely rejected because it more readily fits into the categories of duty or contributory negligence under modern tort law.[42]

IV. The Need for Change

The common law has become disenchanted with the harshness of contributory negligence and assumption of risk because both defenses completely bar a plaintiff's recovery without any inquiry into the extent of each party's deviation from societal norms. This dissatisfaction is understandable because traditional negligence law places the entire burden of loss on one party when, in reality, both parties are usually responsible to some degree.[43] Although the plaintiff may be at fault, the negligence of the defendant still plays a role in causing the injury. Thus, even though the wrongful conduct of the plaintiff may be slight in comparison to that of the defendant, the entire injury will still remain on the plaintiff. Also, the plaintiff is generally the less able of the two to bear the financial burden of the loss.[44] In an attempt to mitigate such harshness, the common law has developed certain exceptions to the absolute defenses. These exceptions include the doctrine of last clear chance,[45] the choice of ways doctrine,[46] the sudden emergency doctrine,[47] and a more sophisticated

---

[42]*Id.* at 293. Several other jurisdictions have reached the same conclusion as the *Dorta* court and have abolished assumption of risk as a separate defense. *See* Li v. Yellow Cab Co., 13 Cal. 3d 804, 829, 532 P.2d 1226, 1241, 119 Cal. Rptr. 858, 875 (1975); Bulatao v. Kauai Motors, Ltd., 49 Haw. 1, 15-17, 406 P.2d 887, 894-95 (1965); Messmer v. Ker, 96 Idaho 75, 80, 524 P.2d 536, 541 (1974); Wilson v. Gordon, 354 A.2d 398, 401-02 (Me. 1976); Springrose v. Willmore, 292 Minn. 23, 24-25, 192 N.W.2d 826, 827 (1971); Lyons v. Redding Constr. Co., 83 Wash. 2d 86, 94-95, 515 P.2d 821, 826 (1973); McConville v. State Farm Mut. Auto. Ins. Co., 15 Wis. 2d 374, 378-79, 113 N.W.2d 14, 16-17 (1962). *But see* Southland Butane Gas Co. v. Blackwell, 211 Ga. 665, 666-68, 88 S.E.2d 6, 8-9 (1955); Munson v. Bishop Clarkson Mem. Hosp., 186 Neb. 778, 780, 186 N.W.2d 492, 494 (1971).

[43]*See* W. Prosser, *supra* note 6, § 67.

[44]Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973); W. Prosser, *supra* note 6, § 67.

[45]W. Prosser, *supra* note 6, § 66.

[46]Although the choice of ways doctrine appears to enhance the defense to negligence actions, its application in Indiana seems to be less harsh. *See* Easley v. Williams, 321 N.E.2d 752, 754 (Ind. Ct. App. 1975); City of Mitchell v. Stevenson, 136 Ind. App. 340, 347-48, 201 N.E.2d 58, 61-62 (1964).

[47]Bundy v. Ambulance Indianapolis Dispatch, Inc., 158 Ind. App. 99, 301 N.E.2d 791 (1973).

proximate cause rationale.[48] In each of these exceptions, however, the "all or nothing" approach is retained. The total loss is merely shifted from one party to another, when, in reality, both parties are at fault.

For example, assume that *A*, a motorist, strikes *B*, a pedestrian crossing the street, and, at the same time, *C*, a passenger in *A*'s automobile, is injured in the accident. *A*'s conduct is the same with respect to both *B* and *C*. Assuming it is possible to attribute a percentage of causation or fault to *A*'s conduct, for instance ninety percent, fairness would dictate that *A* should be responsible for ninety percent of the injuries received by both *B* and *C*. But, under the common law negligence rules, different results are attainable with only slight variations of the type of conduct attributable to the parties. If *A*'s conduct is considered mere negligence, *C*, whether or not his conduct is considered contributory negligence, cannot recover if the jurisdiction has a guest statute.[49] Thus, even though *A*'s conduct was ninety percent responsible for *C*'s injuries, *C* recovers nothing. However, if *A*'s conduct is considered willful and wanton *C* may recover all of his damages.[50] If *C*'s conduct contributed to ten percent of his injuries, should he then recover all of his damages?

Assume that in the accident *B*, the pedestrian, contributed to ten percent of his injuries. If *B*'s conduct is considered to be contributory negligence, then he recovers nothing although *A* was ninety percent responsible for his injuries. However, if the doctrine of last clear chance applies, then *B* can recover all of his damages from *A* even though his (*B*'s) conduct contributed ten percent to his total damages.[51] Events can become even more complicated in products liability cases. For example, assume that *A*, a manufacturer, places on the market a defective machine which injures *B*. Assume further that the defect causes sixty-five percent of *B*'s injury, and *B*'s conduct causes thirty-five percent of his injury. If *B*'s conduct is con-

---

[48]*See* Vargo, *Products Liability, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 265, 277-78 (1976).

[49]Indiana's guest statute allows recovery only for the willful and wanton conduct of the host, IND. CODE § 9-3-3-1 (1976). *See also* Sidle v. Majors, 536 F.2d 1156 (7th Cir. 1976), *certifying questions of state law*, 341 N.E.2d 763 (Ind. 1976), *cert. denied*, 429 U.S. 945 (1976). Contributory negligence of the guest does not deprive him of recovery. *See* Pierce v. Clemens, 113 Ind. App. 65, 75, 46 N.E.2d 836, 840 (1943) (distinguishes contributory negligence from assumption of risk).

[50]*See* note 49 *supra*.

[51]For an explanation of the Indiana version of the doctrine of last clear chance and its constituent elements, see Elgin, Joliet & E. Ry. v. Hood, 336 N.E.2d 417, 419 (Ind. Ct. App. 1975) (quoting Chesapeake & Ohio Ry. v. Williams, 114 Ind. App. 160, 170-71, 51 N.E.2d 384, 388 (1943)).

sidered contributory negligence, he may still recover all of his damages despite the fact that the machine caused only sixty-five percent of his injury.[52] If *B*'s conduct amounts to assumption of risk (incurred risk), or misuse, *B* recovers nothing although sixty-five percent of his damages were caused by the defective machine.[53]

The inequities of Indiana's "all or nothing" approach are illustrated by *Phillips v. Croy*.[54] In *Croy* the plaintiff had been injured while attempting to start a pick-up truck. He first towed the disabled vehicle onto a portion of the two-lane road that offered excellent visibility. The plaintiff then positioned himself between the two vehicles and with battery cables tried to "jump start" the disabled truck. The defendant, driving a southbound vehicle, collided with the parked vehicles, thereby pinning the plaintiff. The court of appeals recognized that the defendant "was guilty of negligence which was a proximate cause of the collision."[55] Nonetheless, the court reversed the jury verdict holding that no reasonable person would have acted as the plaintiff did under the circumstances.[56] Clearly, *Croy could have been* resolved on more equitable grounds by application of the doctrine of comparative fault. Under that approach the plaintiff would recover to the extent that defendant's negligence caused the injury.[57]

Another confusing issue which could be resolved via comparative fault is the "overlap" between contributory negligence and assumption of risk (incurred risk).[58] In Indiana, assumption of risk is

---

[52]Assuming that *B* brings a strict liability action pursuant to RESTATEMENT (SECOND) OF TORTS § 402A (1965), contributory negligence will not defeat his recovery. Gregory v. White Trucking & Equip. Co., 323 N.E.2d 280 (Ind. Ct. App. 1975); RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). *See also* Vargo, *supra* note 48, at 278-80.

[53]Assumption of risk is a defense to strict liability when the plaintiff voluntarily *and unreasonably* encounters a known danger. RESTATEMENT (SECOND) OF TORTS § 402A, Comment n (1965). Assumption of risk and its necessary elements are best explained in *Restatement (Second) of Torts* §§ 496A-G (1965). The Indiana version of assumption of risk appears to differ from the *Restatement* version. *See* Vargo, *1977 Survey*, *supra* note 3, at 210-12.

[54]363 N.E.2d 1283 (Ind. Ct. App. 1977).

[55]*Id.* at 1284.

[56]*Id.* at 1286.

[57]Under comparative fault, the court could have assessed the percentage of fault attributable to both the defendant and plaintiff and allowed the plaintiff to recover his damages minus the amount he contributed to his injury, *e.g.*, if the plaintiff was 40% at fault and the total damages were $10,000, the plaintiff could recover $6,000. Thus, the finder of fact must determine the *total* damages plaintiff has received, then deduct the amount he contributed to his own injury. *See* W. PROSSER, *supra* note 6, § 67.

[58]*See In Search of a Standard*, *supra* note 3, at 893; Vargo, *1977 Survey*, *supra* note 3, at 210-12.

not a "pure form" of the doctrine, but includes much of what is considered contributory negligence. The Indiana doctrine of assumption of risk is defined as follows:

> The doctrine of incurred risk is based upon the proposition that one incurs all the ordinary and usual risks of an act upon which he voluntarily enters, so long as those risks are known and understood by him, *or could be readily discernible by a reasonable and prudent man under like or similar circumstances.*[59]

The italicized section of the above quote sets forth the objective reasonable man standard of negligence law; however, assumption of risk is generally based upon a subjective standard based upon the plaintiff's *actual* knowledge, appreciation, and voluntary consent.[60] By injecting the reasonable man standard of negligence into the assumption of risk definition, Indiana's interpretation of the defense is really a form of contributory negligence. This "overlap" between contributory negligence and assumption of risk causes no problem in common law negligence actions because both defenses are considered complete bars to liability. In strict liability actions, the overlap creates a problem because only assumption of risk is a defense.[61] Without a clear definitional division between the two defenses, much that was intended to be excluded as contributory negligence in strict liability actions will be reinjected into the case through the guise of assumption of risk.[62]

Comparative negligence offers the most satisfactory solution. Under this theory the conduct of the plaintiff, whether defined as contributory negligence or assumption of risk, would offset the amount he could recover in any type of action.[63] An excellent example of the problem with the "overlap" between contributory negligence and assumption of risk is *Sullivan v. Baylor.*[64] The defendant had asked the plaintiff to assist him in erecting a basketball goal on the defendant's property. The defendant instructed plaintiff regarding his intended method of raising the goalpost into position. The defendant attempted to install the goalpost with a tractor that was

---

[59]Stallings v. Dick, 139 Ind. App. 118, 129, 210 N.E.2d 82, 88 (1966) (emphasis added).

[60]*See* RESTATEMENT (SECOND) OF TORTS §§ 496A-G (1965).

[61]*See* notes 52 & 53 *supra.*

[62]*See In Search of a Standard, supra* note 3, at 894-96.

[63]For cases which consider contributory negligence and assumption of risk as offsets to recovery under a comparative fault doctrine, see V. SCHWARTZ, *supra* note 5, § 9.4, at 167.

[64]325 N.E.2d 475 (Ind. Ct. App. 1975).

attached by chains to the top of the goal, while the plaintiff attempted to guide the goalpost with a board. The defendant warned the plaintiff to flee if the goalpost began to fall. During the raising procedure the goalpost began to fall, and the plaintiff, while attempting to escape, was struck by the goal. After plaintiff's case in chief, the trial court granted the defendant's motion for judgment on the evidence. In affirming, the *Baylor* court found that plaintiff had assumed the risk because he acted voluntarily and either knew or understood the risk involved or *in the exercise of reasonable care should have known and understood those risks.*[65]

Baylor did not decide whether defendant's conduct was negligent.[66] Under a comparative fault approach, *Baylor* would have been decided on a more equitable basis. Fault would have been assigned to both the plaintiff and defendant according to the totality of the circumstances surrounding the accident. The plaintiff's knowledge, understanding, appreciation, and voluntariness would have become a part of the percentage factor of plaintiff's fault. Thus, whether the plaintiff either actually knew, understood, and appreciated the risk, or should have known of the risk through reasonable care, would have been irrelevant because his total conduct would have been considered by the fact finder without reference to the doctrinal distribution between contributory negligence and assumption of risk.

Numerous other examples could be given to express the obvious unfairness of the tort law system as it now exists in Indiana; however, it is clear, even to a layman, that the "all or nothing" approach cannot be justified as a logical or fair expression of the proper apportionment of damages among the parties.

V. Rejection of the "All or Nothing" Rule of Contributory Negligence

Comparative negligence, in its simplest form, is merely a method of allocating a percentage of fault to the respective parties in litigation and assessing damages in accordance with those percentages.[67] If the defendant was responsible for seventy-five percent of the plaintiff's damages, he should pay only seventy-five percent. Proper implementation of this principle would result in a more equitable and effective fault system.[68] The liability of each wrong-

---

[65]*Id.* at 477.

[66]*Id.* at 476.

[67]*See* V. Schwartz, *supra* note 5, § 3.2, at 46.

[68]In Hoffman v. Jones, 280 So. 2d 431, 437 (Fla. 1973), the court stated:

> Perhaps the best argument in favor of the movement from contributory to comparative negligence is that the latter is simply a more equitable

doer, under this system, would more accurately reflect his responsibility.[69] Such change, however, was not acceptable to the 19th century judicial and legislative system.

In the early 20th century, criticism of the "all or nothing" approach to liability began to emerge.[70] Because contributory negligence was based upon the protection of industry, particularly the transportation industry of the 19th century, the changes in social customs, which by mid-20th century demanded more protection for the consumer and the individual,[71] demanded a change in the strict adherence to the total bar of contributory negligence.[72] Some protection was available through the use of the doctrine of last clear chance. This doctrine, however, merely shifts a total loss from one party to another without consideration of the respective percentage of responsibility.[73]

---

system of determining liability and a more socially desirable method of loss distribution. The injustice which occurs when a plaintiff suffers severe injuries as the result of an accident for which he is only slightly responsible, and is thereby denied any damages, is readily apparent. The rule of contributory negligence is a harsh one which either places the burden of a loss for which two are responsible upon only one party or relegates to Lady Luck the determination of the damages for which each of two negligent parties will be liable. When the negligence of more than one person contributes to the occurrence of an accident, each should pay the proportion of the total damages he has caused the other party.

[69] *See* V. SCHWARTZ, *supra* note 5, § 21.2, at 340.

[70] *See* Mole & Wilson, *A Study of Comparative Negligence*, 17 CORNELL L.Q. 333 (1932); Nixon, *Changing Rules of Liability in Automobile Accident Litigation*, 3 LAW & CONTEMP. PROB. 476, 482-83 (1936). *See also* V. SCHWARTZ, *supra* note 5, § 1.4, at 12-13.

[71] As explained by Schwartz:

Modern defendants do not need to be protected from the harms they negligently cause as did the infant industries of the early nineteenth century . . . . Today in light of the fact that most enterprises are insured against liability, the need to protect enterprise does not justify putting the entire cost of the accident on the contributorily negligent plaintiff.

V. SCHWARTZ, *supra* note 5, § 21.2, at 339-40.

[72] In Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973), the court stated:

The contemporary conditions must be met with contemporary standards which are realistic and better calculated to obtain justice among all of the parties involved, based upon the circumstances applying between them at the time in question. The rule of contributory negligence as a complete bar to recovery was imported into the law by judges. Whatever may have been the historical justification for it, today it is almost universally regarded as unjust and inequitable to vest an entire accidental loss on one of the parties whose negligent conduct combined with the negligence of the other party to produce the loss. If fault is to remain the test of liability, then the doctrine of comparative negligence which involves apportionment of the loss among those whose fault contributed to the occurrence is more consistent with liability based on a fault premise.

[73] W. PROSSER, *supra* note 6, § 66, at 433.

Early in the 20th century, legislators responded by enacting specific statutes limiting the effect of contributory negligence.[74] By 1920, Congress had enacted the Federal Employer's Liability Act,[75] the Jones Act,[76] and the Death on the High Seas Act,[77] all providing that the contributory negligence of the plaintiff would not bar his action, but would only reduce his recovery in proportion to his negligence. As early as 1910, the state legislatures began to adopt comparative negligence standards.[78] Now approximately two-thirds of the states have adopted some type of comparative fault.[79] Comparative fault principles are found in a considerable number of foreign countries including Canada, Austria, France, Germany, Portugal, Switzerland, Italy, China, Japan, Poland, Russia, and Turkey.[80] England, the country which originated contributory negligence as a complete bar to recovery, now recognizes comparative fault.[81]

Advocates of traditional negligence theory contend that, without specific legislative enactments, comparative fault can not be adopted.[82] Three jurisdictions have adopted comparative fault by judicial decision despite such contentions.[83]

In 1973, the Florida Supreme Court, in *Hoffman v. Jones*,[84] rejected the complete bar of contributory negligence in favor of a pure form of comparative fault. Although the legislature of Florida had failed to pass proposed legislation for the enactment of comparative fault, the court found this to be no obstacle because the problem was determined to be judicial.[85] The court found that the doctrine of contributory negligence was not so clearly a part of the common law that it was included in Florida statutory law by virtue of the statute

---

[74]*See* V. SCHWARTZ, *supra* note 5, § 1.4, at 11.

[75]Federal Employers' Liability Act of 1908, ch. 149, § 3, 35 Stat. 66 (codified at 45 U.S.C. § 55 (1970)).

[76]Act of June 5, 1920, ch. 250, § 33, 41 Stat. 1007 (codified at 46 U.S.C. § 688 (1970)).

[77]Act of March 30, 1920, ch. 111, § 6, 41 Stat. 537 (codified at 46 U.S.C. § 766 (1970)).

[78]Act of April 16, 1910, ch. 135, § 1, 1910 Miss. Laws 125 (codified at MISS. CODE ANN. § 11-7-15 (1972)).

[79]*See* note 5 *supra*.

[80]Maloney, *From Contributory To Comparative Negligence: A Needed Law Reform*, 11 U. FLA. L. REV. 135, 154 (1958), *noted in* Hoffman v. Jones, 280 So. 2d 431, 436 (Fla. 1973).

[81]Maloney, *supra* note 80, at 154.

[82]*See, e.g.*, Li v. Yellow Cab Co., 13 Cal. 3d 804, 813, 532 P.2d 1226, 1232, 119 Cal. Rptr. 858, 864 (1975).

[83]Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1225, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

[84]280 So. 2d 431 (Fla. 1973).

[85]*Id.* at 438.

adopting the common law as the law of the state.[86] Thus, the doctrine was judicially-created and subject to judicial reconsideration.

Following the Florida precedent, the California Supreme Court, in *Li v. Yellow Cab Co.*,[87] adopted a pure form of comparative fault. That court there faced the additional obstacle of a recent legislative enactment adopting contributory negligence as a complete defense. The defendant argued that the court could not judicially adopt the comparative fault doctrine because the doctrine of separation of powers required that any change come from the legislature. The court held that such a result was not intended by the legislature in enacting the Civil Code: "[R]ather it was the intention of the Legislature to announce and formulate existing common law principles and definitions for purposes of orderly and concise presentation and with a distinct view toward continuing judicial evolution."[88] Thus, the enactment did not preclude further judicial development of the law.

The Alaska Supreme Court followed *Hoffman* and *Li* in the adoption of a pure form of comparative fault in *Kaatz v. State.*[89] The court stated: "[C]ontinued adherence to the contributory negligence rule, absent legislative change, represents judicial inertia rather than a reasoned consideration of the intrinsic value of the rule."[90]

These cases serve as examples that the law of negligence in this area may be modified by judicial action to fit society's needs.

VI. The Status of Comparative Fault in Indiana

During 1977 a comparative fault bill was proposed in Indiana, but failed to become law.[91] Prior to this proposed legislation, the Indiana Court of Appeals, in *Birdsong v. ITT Continental Baking Co.*,[92] rejected the application of comparative negligence. In *Birdsong*, the plaintiff was injured when his vehicle was hit in the rear by the defendant. The defendant contended that the plaintiff was contributorily negligent because he had failed to use a seat belt. The trial court instructed the jury that any damages incurred by the

---

[86]*Id.* at 435 (construing Fla. Stat. § 2.01 (1973)).

[87]13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

[88]*Id.* at 814, 532 P.2d at 1233, 119 Cal. Rptr. at 865.

[89]540 P.2d 1037 (Alaska 1975).

[90]*Id.* at 1049. The court was also influenced by United States v. Reliable Transfer Co., 421 U.S. 397 (1975) in which the United States Supreme Court replaced the historic rule of divided damages in maritime collision cases with a pure comparative negligence rule. In response to argument that such a change was the province of Congress, the Court stated that admiralty law was an area which Congress left to the Court, and that "[n]o statutory or judicial precept precludes a change in the rule of divided damages . . . ." *Id.* at 409.

[91]H.B. 1958, 100th Gen. Assembly, 1977 Ind. House J. 129.

[92]160 Ind. App. 411, 312 N.E.2d 104 (1974).

plaintiff as a result of his failure to wear the seat belt were not recoverable. The court of appeals reversed, stating that the instruction was based upon comparative negligence principles that are not recognized in Indiana.[93]

Although the "seat belt" defense has been rejected in most jurisdictions,[94] Wisconsin[95] and New York[96] recognize the defense. In New York, the plaintiff's recovery is reduced by the *amount of injury* attributable to the non-use of his seat belt.[97] In Wisconsin the plaintiff's recovery is reduced by the *percentage of fault* attributable to the non-use of his seat belt.[98] New York considers the seat belt defense one of apportionment of damages while Wisconsin apportions fault. Dean Twerski suggests a third approach to the seat belt defense. First, there should be apportionment of damages attributable to the original collision and the damages attributable to the non-use of the seat belt (add-on injury), then the fault between the plaintiff and defendant as to those add-on injuries should be compared.[99] Under Dean Twerski's analysis the defendant would be responsible for all of the original collision and a percentage attributable to his fault for the add-on injuries.[100]

In refusing to accept the seat belt defense, the *Birdsong* court cited three prior Indiana decisions refuting comparative negligence.[101] *All* three cases merely state that comparative negligence does not apply in Indiana and do not provide any explanation or analysis for the rejection of the doctrine.[102] The judicial rejection of comparative negligence seems to have originated in *Pennsylvania v. Roney*,[103] in which the court stated: "We agree with counsel that the doctrine of comparative negligence is unsound."[104] The *Roney* court gave absolutely no explanation of the statement. Indiana law, therefore, is relatively void of a rationale for either the rejection or adop-

---

[93]*Id.* at 413, 312 N.E.2d at 106.

[94]*See* Twerski, *The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 820 & n.7 (1977).

[95]Bentzler v. Braun, 34 Wis. 2d 362, 149 N.W.2d 626 (1967).

[96]Spier v. Barker, 35 N.Y.2d 444, 323 N.E.2d 164, 363 N.Y.S.2d 916 (1974).

[97]*Id.* at 449-50, 323 N.E.2d at 167, 363 N.Y.S.2d at 920.

[98]34 Wis. 2d at 385, 149 N.W.2d at 639.

[99]*See* Twerski, *supra* note 94, at 821-22.

[100]*Id.*

[101]160 Ind. App. at 413 (citing Hoesel v. Cain, 222 Ind. 330, 53 N.E.2d 165 (1944); Pennsylvania Co. v. Roney, 89 Ind. 453 (1883); Lewis v. Mackley, 122 Ind. App. 247, 99 N.E.2d 442 (1951)).

[102]Hoesel v. Cain, 222 Ind. at 337, 53 N.E.2d at 168; Pennsylvania Co. v. Roney, 89 Ind. at 455; Lewis v. Mackley, 122 Ind. App. at 253, 99 N.E.2d at 445.

[103]89 Ind. 453 (1883).

[104]*Id.* at 455.

tion of comparative fault as a basis of distribution of the costs of accidental injury in tort law. In light of the precedents of *Hoffman*, *Li*, and *Kaatz*, it would be appropriate for Indiana courts to reconsider the rejection of comparative negligence.

VII. Problems of Administration

Considerable resistance to comparative negligence is based upon the difficulties in determining the specific percentage of fault attributable to the parties.[105] Sufficient guidelines for the jury, through the use of special verdicts and interrogatories, will overcome most problems.[106] Defendants have argued that comparative negligence will thwart settlements and raise insurance rates,[107] and will, therefore, be detrimental to the consumer. Recent studies indicate, however, that settlements can be achieved as readily under a comparative negligence system as under the contributory negligence rule,[108] and, in addition, other research has indicated that the effect on insurance rates is minimal.[109]

Additional objections to comparative negligence have been based upon the confusion created by established doctrines of assumption of risk and last clear chance.[110] Opponents of comparative negligence state that assumption of risk and the last clear chance doctrines do not readily fit into the percentage-of-fault framework of comparative negligence, and, even if some type of comparative negligence were adopted, both assumption of risk and

---

[105]This argument was considered in Li v. Yellow Cab Co., 13 Cal. 3d 894, 822-27, 532 P.2d 1226, 1239-42, 119 Cal. Rptr. 858, 871-74 (1975).

[106]The *Li* court stated:

> Guidelines might be provided the jury which will assist it in keeping focussed upon the true inquiry . . . and the utilization of special verdicts or jury interrogatories can be of invaluable assistance in assuring that the jury has approached its sensitive and often complex task with proper standards and appropriate reverence.

Id. at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872 (citations omitted). For a thorough discussion of the practical measures which can be taken to overcome this problem, see V. Schwartz, *supra* note 5, § 17.4.

[107]*See, e.g.*, Kaatz v. State, 540 P.2d 1037, 1048 (Alaska 1975).

[108]*See* Rosenberg, *Comparative Negligence in Arkansas: A Before and After Survey*, 36 N.Y. S.B.J. 457. The author concludes: "The 98 lawyer responses show by a distinct consensus that the new rule [comparative negligence] had a discernible effect upon the settlement rate in these cases. Generally speaking, the effect was 'favorable,' in the sense that more settlements were promoted than under the former rule." *Id.* at 466.

[109]*See* Peck, *Comparative Negligence And Automobile Liability Insurance*, 58 Mich. L. Rev. 689, 717-18, 726-28 (1960).

[110]These arguments were also considered in Li v. Yellow Cab Co., 13 Cal. 3d at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.

last clear chance should be complete bars to recovery.[111] These objections have caused the courts some doctrinal difficulty. With respect to last clear chance, several jurisdictions have absolished the "all or nothing" approach and now treat such conduct as only one factor in assessing each party's fault.[112] Those jurisdictions that have retained the doctrine have limited its scope.[113] Last clear chance developed as a palliative for the hardships of traditional contributory negligence.[114] With the adoption of the more equitable comparative fault system, such hardships need no longer exist.[115] Furthermore, to allow plaintiff to recover his entire damages, despite his own contributing negligence, because the defendant had the last clear chance would provide plaintiff with a windfall and be inconsistent with the principles of comparative fault.

With respect to assumption of risk, the predominant approach in comparative fault states has been to merge the defense with contributory negligence, insofar as they overlap.[116] Thus, the general trend is to treat assumption of risk and last clear chance as subcategories of contributory negligence. As such, the conduct relevant to establishing these defenses is to be considered in the total percentage of fault allocated to a party. For example, if the plaintiff consented to undertake a certain risk, his conduct in so doing would be one factor to be considered in assessing his share of responsibility.

Four distinct types of comparative fault have been offered:[117] (1) *Pure comparative negligence.*—This form of comparative negligence allows the plaintiff to recover the exact percentage of defendant's fault whether it be one percent, one hundred percent or anywhere in between.[118]

(2) *The plaintiff's negligence not as great as defendant's.*—Most jurisdictions have adopted a "modified comparative fault" system which allows the plaintiff recovery only if his fault is

---

[111]*Id.*

[112]*See* Macon v. Seaward Const. Co., 555 F.2d 1 (1st Cir. 1977) (applying New Hampshire law); Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3rd 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973); Cushman v. Perkins, 245 A.2d 846 (Me. 1968).

[113]*See* V. SCHWARTZ, *supra* note 5, § 7.2, at 139-40.

[114]*See* W. PROSSER, *supra* note 6, § 66, at 426; V. SCHWARTZ, *supra* note 5, § 7.2, at 139.

[115]Li v. Yellow Cab Co., 13 Cal. 3rd at 824, 532 P.2d at 1240, 119 Cal. Rptr. at 872 (citing V. SCHWARTZ, *supra* note 5, § 7.2, at 137-39; Prosser, *supra* note 7, at 27).

[116]*See* note 42 *supra* and accompanying text.

[117]Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 MERCER L. REV. 373, 374 & n.6 (1978).

[118]*See* V. SCHWARTZ, *supra* note 5, § 3.2, at 46.

less than that of the defendant. Thus, if the plaintiff is forty-nine percent percent at fault and the defendant fifty-one percent at fault, the plaintiff can recover forty-nine percent of his damages; however, if the plaintiff's fault reaches fifty percent, he recovers nothing.[119]

(3) *Plaintiff's negligence "not greater than defendant's."*—A few jurisdictions allow the plaintiff to recover if his fault equals, but does not exceed the fault of the defendant. Thus, the plaintiff can recover fifty percent of his damages if he and the defendant are both found to be fifty percent at fault, but once the plaintiff's fault reaches fifty-one percent he can recover nothing.[120]

(4) *Plaintiff's negligence slight in comparison with defendant's gross negligence.*—Some jurisdictions in the past have, in a loose frame-work, allowed the plaintiff to recover his entire loss if his percentage of negligence was only slight in comparison to defendant's gross negligence.[121]

The reason for four different systems of comparative negligence is that legislatures have been hesitant to abolish the "all or nothing" rule of negligence.[122] All forms, other than pure comparative fault, can be considered compromises which attempt to retain some of the common law principles. For example, the "fifty percent system," where the plaintiff is deprived of recovery if his fault equals that of the defendant, is reminiscent of the contributory negligence bar, the premise of which was that when both parties were at fault the loss should remain on the injured party.[123] The general trend seems to favor the pure form of comparative negligence, as indicated by the recent adoption of pure "comparative fault" by the National Conference of Commissioners on Uniform State Laws.[124]

VIII. The Uniform Comparative Fault Act

Any serious consideration, by either the Indiana legislature or the Indiana Supreme Court, of adopting a comparative fault system should include close examination of the Uniform Comparative Fault Act.[125] This Act adopts a "pure form" of comparative fault, *i.e.*, it does not limit the plaintiff's recovery when his fault equals or ex-

---

[119]*Id.* at § 3.5, at 75. According to Schwartz, "[o]f the thirty-two states that had adopted comparative negligence by 1977, twenty-three selected a 50% system." *Id.* § 3.5, at 22 (Supp. 1978).

[120]*Id.* § 3.5, at 75 (1974 & Supp. 1978).

[121]*Id.* § 3.4, at 64.

[122]*Id.* § 3.5, at 78.

[123]*See* note 19 *supra* and accompanying text.

[124]The Uniform Comparative Fault Act was recommended for enactment in all states by the National Conference on Uniform State Laws in 1977.

[125]For an excellent examination of the Act, *see* Wade, *supra* note 117.

ceeds the fault of the defendant.[126] The Act applies to negligence, warranty, and strict liability actions, but is not intended to apply to breaches of express or implied warranties in contract where the buyer has merely lost the benefit of his bargain.[127] The plaintiff's fault, which diminishes his recovery, includes negligence, recklessness, unreasonable assumption of risk, misuse and the unreasonable failure to avoid or mitigate damages.[128] Judgment may be entered against each of several joint *tortfeasors* for the full amount of plaintiff's damages less his fault. The amount of each defendant's responsibility is indicated in the judgment, and, if one joint tortfeasor's share is uncollectable, that amount is distributed proportionally among all parties at fault including the plaintiff.[129] Provisions for setoff and counterclaims are set forth in the Act.[130] Contribution among the tortfeasors is based upon their "equitable share of the obligation."[131] Thus, any release given to a tortfeasor by the plaintiff will reduce the plaintiff's ultimate recovery by the released party's equitable share of the obligation.[132] The percentage of fault of each party includes the nature and conduct of the parties and the causal relation of such conduct to the injury received by the plaintiff.[133]

Although the Act may present problems in some areas,[134] it appears to formulate a both theoretical and practical approach to the apportionment of damages among the parties for injuries resulting from numerous types of tortious conduct.

IX. CONCLUSION

The common law approach to tort law, with its "all or nothing" rationale, is a remnant of archaic social demands prominent during the last century. Indiana's adherence to such concepts is unrealistic in view of the alternative of comparative fault which provides a logical and equitable basis for distribution of damages. Ample ex-

---

[126]UNIFORM COMPARATIVE FAULT ACT § 1(a) (1977).

[127]Wade, *supra* note 117, at 374.

[128]UNIFORM COMPARATIVE FAULT ACT § 1(b) (1977).

[129]*Id.* § 2.

[130]*Id.* § 3.

[131]*Id.* § 4(a).

[132]*Id.* § 6.

[133]*Id.* § 2(b).

[134]Dean Twerski suggests that application of comparative fault to causes of action based upon "products liability" may have some theoretical difficulties. *See* Twerski, *supra*, note 94, at 821. Dean Wade, however, favors the use of comparative fault. *See* Wade, *supra* note 117, at 386-88. In addition, the use of comparative fault raises serious problems with contribution among multiple defendants and third-party suits by an employee against manufacturers of capital machinery where Workmen's Compensation provides immunity to an employee. *Id.* at 388-91.

amples from other jurisdictions provide a safe and easy path to follow. Theoretical problems with assumption of risk and last clear chance defenses can be surmounted; assumption of risk can be merged with the doctrine of contributory negligence or the duty element of negligence,[135] and last clear chance can be allocated to a percentage factor of fault with little difficulty.[136] Application of comparative fault theories outside of negligence, such as in the area of strict liability, may prove more difficult, however, such difficulties have been overcome in some jurisdictions.[137]

The practical application of comparative fault in the trial court system does not seem overly burdensome. As was stated in *Hoffman v. Jones*:

> We feel the trial judges of this State are capable of applying this comparative negligence rule without our setting guidelines in anticipation of expected problems. The problems are more appropriately resolved at the trial level in a practical manner instead of theoretical solution at the appellate level. The trial judges are granted broad discretion in adopting such procedure as may accomplish the objectives and purposes expressed in this opinion.[138]

For those who defend the present Indiana law and argue that contributory negligence is not harsh in its practical application because juries tend to disregard the court's instructions on the law in an effort to afford some measure of rough justice to injured parties, Dean Maloney's response seems applicable:

> [T]here is something basically wrong with a rule of law that is so contrary to the settled convictions of the lay community that laymen will almost always refuse to enforce it, even when solemnly told to do so by a judge whose instructions they have sworn to follow. . . . [T]he disrespect for law engendered by putting our citizens in a position in which they feel it is necessary to deliberately violate the law is not something to be lightly brushed aside; and it comes ill from

---

[135]*See* notes 36-42, 116 *supra* and accompanying text.

[136]*See* notes 113-16 *supra* and accompanying text.

[137]*See* Butand v. Suburban Marine & Sporting Goods, Inc., 555 P.2d 42 (Alaska 1976); Daly v. General Motors Corp., 20 Cal. 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); West v. Caterpiller Tractor Co., 336 So. 2d 80 (Fla. 1976).

[138]280 So. 2d at 439-40, *quoted with approval in* Li v. Yellow Cab Co., 13 Cal. 3d at 826-27, 532 P.2d at 1242, 119 Cal. Rptr. at 874.

> the mouths of lawyers, who as officers of the courts have sworn to uphold the law, to defend the present system by arguing that it works because jurors can be trusted to disregard that very law.[139]

The time is ripe for Indiana to join the 20th century.

---

[139]Maloney, *supra* note 80, at 151-52.

Notes

Ademption By Extinction in Indiana

I. INTRODUCTION

Ademption by extinction[1] presents a potential problem when property designated by a specific bequest[2] cannot be identified in the testator's estate at death. The problem is to determine whether the specific legatee should receive other assets from the decedent's estate as a substitute for the missing or changed bequest, or whether the bequest is lost.[3] There are two fundamental common law approaches to this problem: the ancient rule, or intent theory; and the identity doctrine.[4] Under the intent theory action by third parties will not adeem the bequest or devise, and the only relevant inquiry is to ascertain the testator's intent.[5] While the earliest American and English cases used this subjective approach,[6] it was later abandoned in favor of the identity doctrine.[7] Under the identity rule a testator's intent is irrelevant and the inquiry is confined to objective determination of two questions. Is the bequest specific? Is the subject matter to be found in the decedent's estate? If the bequest is specific and the exact subject matter is missing from the estate, the bequest is adeemed[8] regardless of the testator's intent.[9] By 1850, this approach had been adopted in a majority of American jurisdictions.[10]

---

[1]T. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 134, at 743-45 (2d ed. 1953); 6 W. BOWE & D. PARKER, PAGE ON THE LAW OF WILLS § 54.1, at 241-44 (1962) [hereinafter cited as PAGE]. Ademption by extinction should not be confused with ademption by satisfaction wherein the testator by an inter vivos transfer of the subject matter, or substitute for a general gift, satisfies the general bequest or devise. *See generally* T. ATKINSON, § 133; PAGE, §§ 54.1-54.2, 54.21-54.37.

[2]Only specific bequests and devises may be adeemed by extinction. T. ATKINSON, *supra* note 1, § 132; PAGE, *supra* note 1, § 54.5.

[3]If the specific bequest or devise is adeemed, it will usually pass under the residuary clause or by intestacy if there is no residuary clause. T. AKINSON, *supra* note 1, § 132, at 736.

[4]Warren, *The History of Ademption*, 25 IOWA L. REV. 290, 304-10 (1940).

[5]Page, *Ademption by Extinction: Its Practical Effects*, 1943 WIS. L. REV. 11, 15-16.

[6]*See, e.g.*, Beall v. Blake, 16 Ga. 119, 122 (1854); Stout v. Hart, 7 N.J.L. 414, 426 (1801); Orme v. Smith, 1 Eq. Abr. 302 (1711); Warren, *supra* note 4, at 299-301.

[7]English attempts to inquire into the testator's intent produced a mass of irreconcilable decisions and much confusion as to the circumstances under which a bequest is adeemed. Page, *supra* note 5, at 18-19.

[8]Ashburner v. Macguire, 29 Eng. Rep. 62 (1786).

[9]Richards v. Humphreys, 32 Mass. (15 Pick.) 133, 135-37 (1833); King v. Sheffey, 35 Va. (8 Leigh) 614, 617 (1837); Stanley v. Potter, 30 Eng. Rep. 83 (1789); Humphreys v. Humphreys, 30 Eng. Rep. 85 (1789).

[10]T. ATKINSON, *supra* note 1, § 134, at 743; Warren, *supra* note 4, at 307-10.

Although the identity doctrine is easier to apply, it has been widely criticized.[11] American courts have developed numerous techniques to avoid its harsh results[12] and a tendency to return to the intent rule is apparent in several states.[13]

Indiana's position on ademption, like that in many other states, is unsettled. Several early cases show that the principles of ademption by extinction have been confused with the principles of ademption by satisfaction[14] and those of the revocation of wills.[15] This confusion is compounded by recent appellate court decisions which are in direct conflict on whether the intent[16] or identity doctrines[17] should be applied. This Note will examine the present status and background of ademption by extinction in Indiana and give an overview of the basic methods, problems, and advantages of both the intent and identity doctrines. Finally, the possibility of clarification through legislation will be evaluated.

II. INDIANA'S ADEMPTION RULES

Indiana has only a few ademption cases, and they apply the ademption principles in a conflicting manner.[18] The Indiana Supreme Court has never spoken directly on the question which creates even greater confusion.

In *New Albany Trust Co. v. Powell*,[19] the testator had bequeathed

---

[11]Mechem, *Specific Legacies of Unspecific Things—Ashburner v. Macguire Reconsidered*, 87 U. PA. L. REV. 546, 546-53 (1939); Paulus, *Ademption by Extinction: Smiting Lord Thurlow's Ghost*, 2 TEX. TECH. L. REV. 195, 227-33 (1971); Warren, *supra* note 4, at 301, 326-27; Note, *Ademption and the Testator's Intent*, 74 HARV. L. REV. 741, 750-51 (1961) [hereinafter cited as *Ademption*]; Note, *Ademption in New York: The Identity Doctrine and the Need for Complete Abrogation by Legislation*, 25 SYRACUSE L. REV. 978, 990-93 (1974) [hereinafter cited as *Ademption in New York*].

[12]Mechem, *supra* note 11, at 553-76; Paulus, *supra* note 11, at 197-207; Smith, *Ademption by Extinction*, 6 WIS. L. REV. 229, 233-38 (1931); Warren, *supra* note 4, at 319-25; *Ademption*, *supra* note 11, at 743-45; Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085, 1093-96 (1953); *Ademption in New York*, *supra* note 11, at 993-97.

[13]*See generally* Warren, *supra* note 4, at 316-17; Note, *Wills: Ademption By Extinction In California*, 18 HASTINGS L.J. 461, 463-64 (1967) [hereinafter cited as *Ademption by Extinction in California*]; Note, *Ademption in Iowa—A Closer Look at the Testator's Intent*, 57 IOWA L. REV. 1211, 1218 (1972).

[14]Roquet v. Eldridge, 118 Ind. 147, 20 N.E. 733 (1888); Stokesberry v. Reynolds, 57 Ind. 425 (1877); Weston v. Johnson, 48 Ind. 1 (1874); Robbins v. Swain, 7 Ind. App. 486, 34 N.E. 670 (1893).

[15]Simmons v. Beazel, 125 Ind. 362, 25 N.E. 344 (1890); Sturgis v. Work, 122 Ind. 134, 22 N.E. 996 (1889); Swails v. Swails, 98 Ind. 511 (1884).

[16]Brown v. Schaffer, 145 Ind. App. 591, 252 N.E.2d 142 (1969).

[17]Pepka v. Branch, 155 Ind. App. 637, 294 N.E.2d 141 (1973).

[18]*Id.*; Brown v. Schaffer, 145 Ind. App. 591, 252 N.E.2d 142 (1969); New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N.E. 640 (1902).

[19]29 Ind. App. 494, 64 N.E. 640 (1902).

"200 shares of the capital stock of the Madison Gaslight Company,"[20] to his granddaughter and the residue of the stock to his wife. The testator owned 259 shares of this stock when the will was executed, but subsequently sold all but 100 shares. The court, without first identifying the appropriate rule, classified the granddaughter's bequest as specific.[21] Because the remaining stock was insufficient to fully satisfy the specific bequest, the court held that it was adeemed pro tanto.[22] The court's explanation of the initial classification indicated a search for the testator's intent as expressed in his will.[23] This procedure creates uncertainty regarding which principle the court applied to the ademption problem. Although the court looked to the testator's intent in classifying the bequest,[24] such an approach is not necessarily inconsistent with the identity rule. The court stated: "The law is settled that a legacy is adeemed if the specific thing does not exist at the testator's death,"[25] citing *Ashburner v. Macguire*.[26]

Arguably, the court's inquiry into the testator's intent was the crucial point of the decision and may be interpreted as an application of the intent doctrine. If the intent rule was applied, however, *Ashburner* was inappropriately cited. A more reasonable explanation is that the testator's intent was only relevant in determining the nature of the bequest and not in determining whether the stock was adeemed.[27] The court cited other cases for the general proposition that the primary rule of construction is to determine the testator's intent,[28] but none of the cited cases dealt with ademption

[20]*Id.* at 496, 64 N.E. at 640.

[21]Arguably, the bequest could have been classified as general. Prior to the holding in Waters v. Selleck, 201 Ind. 593, 170 N.E. 20 (1930), the controlling statement was found in Roquet v. Eldridge, 118 Ind. 147, 20 N.E. 733 (1889), wherein the court stated: "A legacy is specific when it can be satisfied only by the transfer or delivery of some particular portion of, or article belonging to, the estate, which the testator intended should be transferred to the legatee in specie." *Id.* at 149, 20 N.E. at 734. In *Powell*, the testator's language did not indicate that the bequest could be satisfied only by the transfer of specific assets owned at death and was not confined to *my* 200 shares but operated only as a general gift of 200 shares of the specific stock. There were sufficient assets in the estate to purchase the additional stock and the residuary clause stated that the wife was to have the balance of the assets only "'after paying the above legacy mentioned . . . .'" 29 Ind. App. at 496, 64 N.E. at 640. The court held, however, the testator had intended to make a specific bequest because there was no authority in the will to purchase securities.

[22]29 Ind. App. at 502, 64 N.E. at 642.

[23]*Id.* at 499, 64 N.E. at 641.

[24]*Id.* at 500, 64 N.E. at 642.

[25]*Id.* at 502, 64 N.E. at 642 (citing Ashburner v. Macguire, 29 Eng. Rep. 62 (1786)).

[26]29 Eng. Rep. 62 (1786).

[27]Ind. App. at 499, 64 N.E. at 641.

[28]*Id.* (citing Hartwig v. Schiefer, 147 Ind. 64, 46 N.E. 75 (1897); Corey v. Springer, 138 Ind. 506, 37 N.E. 322 (1894); Lutz v. Lutz, 2 Blackf. 72 (Ind. 1827)); Bray v. Miles, 23 Ind. App. 432, 54 N.E. 446 (1899)).

questions. While *Powell* does not provide a clear holding for either the identity or intent theories, the process employed by the court is most similar to the identity rule.

In *Brown v. Schaffer*,[29] the testator had devised "all of my right, title and interest in and to the estate of Harold C. Brown, my deceased brother,"[30] to his deceased brother's wife. After the brother's will was executed, the testator's entire interest was deposited in bank certificates that remained intact from date of deposit until testator's death. The executor brought an action to construe the will claiming that full payment of the interest extinguished the specific bequest and that the certificates of deposit should pass to the residuary legatee. The testator's sister-in-law argued that the testator's receipt during his lifetime of his interest in the estate of his deceased brother did not constitute an ademption. She claimed that the specific bequest had not been destroyed, alienated, or extinguished, but merely changed in form and was a part of the estate at death.

The court, citing *Powell* as the only relevant Indiana ademption case,[31] indicated that the appropriate inquiry is to determine the testator's intent, and stated:

> The intention of the testator is to be determined from a full and complete consideration of the will as a whole . . . and from all of the facts and circumstances surrounding the testator at the time the will was executed . . . .
>
> Once the intention of the testator has been determined, all other rules of law must bend to such intent . . . so long as it does not violate some positive rule of law.[32]

The Indiana cases[33] and statute[34] cited for this rule of construction, however, would not apply to an ademption case unless the intent doctrine had been accepted. The language in *Brown* also presents the broader question of how far a search for the testator's intent may reach. The authorities relied upon indicate that such a search would be limited to the instrument itself and to the situation

---

[29]145 Ind. App. 591, 252 N.E.2d 142 (1969).

[30]*Id.* at 595, 252 N.E.2d at 145.

[31]*Id.* at 615, 252 N.E.2d at 156 (citing New Albany Trust Co. v. Powell, 29 Ind. App. 494, 64 N.E. 640 (1902)).

[32]145 Ind. App. at 602, 252 N.E.2d at 149.

[33]Pierce v. Farmers State Bank, 222 Ind. 116, 51 N.E.2d 480 (1943); St. Mary's Hosp. v. Long, 215 Ind. 1, 17 N.E.2d 833 (1938); Ridgeway v. Lanphear, 99 Ind. 251 (1884); Osburn v. Murphy, 135 Ind. App. 291, 193 N.E.2d 669 (1963); *In re* Will of Duvall, 125 Ind. App. 646, 129 N.E.2d 377 (1955).

[34]IND. CODE § 29-1-6-1(i) (1976).

and circumstances surrounding the testator at the time of its execution.[35]

In adopting the intent doctrine in *Brown*, the First District Court of Appeals indicated that it had followed the majority rule.[36] In this respect the court was undoubtedly confused. The cases analyzed by the court do not clearly support the intent doctrine[37] and several of the cases cited are contradictory.[38] Also, although there has been some wavering in recent years, commentators indicate that the identity doctrine has continued to be the majority rule.[39]

The court also indicated that the sole Indiana ademption statute[40] supported their conclusion.[41] Because the statute, derived

---

[35]*See* notes 33-34 *supra*.

[36]145 Ind. App. at 605, 252 N.E.2d at 151.

[37]*Id.* at 606-10, 252 N.E.2d at 152-53 (construing Creed v. Knoll, 255 Cal. App. 2d 80, 63 Cal. Rptr. 80 (1967); King v. Sellers, 194 N.E. 533, 140 S.E. 91 (1927); Gist v. Craig, 142 S.C. 407, 141 S.E. 26 (1927); *In re* Bradley's Will, 73 Vt. 253, 50 A. 1072 (1901)). The *Brown* court's examination of Gist v. Craig, 142 S.C. 407, 141 S.E. 26 (1927), did not mention the testator's intent and was an application of the substance/form exception to the identity rule. In King v. Sellers, 194 N.C. 533, 140 S.E. 91 (1927), the court was dealing with a case of ademption by satisfaction in which the common law rule is that the testator's intent is the controlling factor, Paulus, *supra* note 11, at 214 n.74. *In re* Bradley's Will, 73 Vt. 253, 50 A. 1072 (1901), does apply an intent approach, but the bequests were held not to be specific and evidence of intent was, therefore, irrelevant. Vermont, however, has since abandoned the intent approach in *In re* Barrow's Estate, 103 Vt. 501, 156 A. 408 (1931). Creed v. Knoll, 255 Cal. App. 2d 80, 63 Cal. Rptr. 80 (1967), is representative of recent cases in that jurisdiction taking a liberal approach toward the identity doctrine. California, however, has not completely abandoned the identity approach; *see, e.g., Ademption by Extinction in California*, *supra* note 13.

[38]Speyers v. Manchester, 131 Conn. 598, 41 A.2d 783 (1945); Pridemore's Exec. v. Bailey, 300 S.W.2d 559 (Ky. 1957) (decided under a relevant statute); Goode v. Reynolds, 208 Ky. 441, 271 S.W. 600 (1925); Gray v. McCausland, 314 Mass. 743, 51 N.E.2d 441 (1943); Day v. Brooks, 10 Ohio Misc. 273, 224 N.E.2d 557 (1967); Warrent v. Shoemaker, 4 Ohio Misc. 15, 207 N.E.2d 419 (1965); *In re* Estate of Biss, 232 Or. 26, 374 P.2d 382 (1962); *In re* Gerlach's Estate, 364 Pa. 207, 72 A.2d 271 (1950), *cited in* Brown v. Schaffer, 145 Ind. App. at 606, 252 N.E.2d at 151-52.

[39]Warren, *supra* note 4, at 307-10.

[40]IND. CODE § 29-1-18-44 (1976) provides:

> In case of the guardian's sale or other transfer of any real or personal property specifically devised by the ward, who was competent at the time when he made the will but was incompetent at the time of the sale or transfer and never regained competency, so that the devised property is not contained in the estate at the time of the ward's death, the devisee may at his option take the value of the property at the time of the ward's death with incidents of a general devise, or the proceeds thereof with the incidents of a specific devise.

[41]145 Ind. App. at 611, 252 N.E.2d at 154. The court stated: "Thus, the only ex-

from section 231 of the Model Probate Code, was designed as a specific exception to the identity doctrine,[42] it is doubtful that its adoption provides any support for the intent theory. Indeed, if the intent rule were the law in Indiana, the statute would be unnecessary because a guardian's acts would already be subject to a determination of the testator's intent.

Possibly the *Brown* court confused the substance-form exception to the identity rule with the intent doctrine. Under the exception some courts admit evidence of the testator's intent to determine whether the testator intended to make a substantial change in the property.[43] Although this approach has been criticized as a means of avoiding the identity doctrine,[44] it is distinguishable from the intent doctrine. Under this exception, if the change is held to be substantial, the bequest will be adeemed.[45] Under the intent rules, however, if the testator intended a specific bequest, the substitute property will pass even if the change is substantial.[46] Authority offered in *Brown* to support the intent doctrine actually upheld the substance-form exception and did not support the intent theory.[47] Arguably,

---

pression of our legislature upon the subject of ademption supports the rule against arbitrary ademptions and supports the intent theory . . . ." *Id.*

[42]The compiler's comments following IND. CODE § 29-1-18-44 (Burns 1973) are taken from the MODEL PROBATE CODE COMMENTS § 231 and state in part:

> The Kentucky statute purports to give the value of any adeemed devise to the devisee if he is an heir of the testator. The Model Probate Code does not deal with this more general proposition but proceeds upon the theory that the remedy for the usual ademption situation lies in greater liberality by the courts in holding that devises are general or demonstrative rather than specific . . . . When the testator becomes incompetent, however, it seems unfair that acts of his guardian should work an ademption when the incompetent has no opportunity to remedy the situation by making a fresh will.

See also notes 140-41 *infra* and accompanying text.

[43]*See generally* T. ATKINSON, *supra* note 1, § 134, at 747-48; Paulus, *supra* note 11, at 199; Note, *Ademption by Extinction: The Form and Substance Test*, 39 VA. L. REV. 1085 (1953). Although evidence may be admitted to show whether the testator intended a substantial or merely a formal change in the property, a complete disappearance of the subject matter will cause an ademption without regard to intent. Such an inquiry was disapproved by the Second District Court of Appeals in Pepka v. Branch, 155 Ind. App. 637, 294 N.E.2d 141 (1973), in which it was held that the trial court erred in admitting evidence of the testator's intent regarding the nature of the change. *See* notes 63-64 *infra* and accompanying text.

[44]Evans, *Effect of Corporate Transformation Upon Ademption, Lapse, and Fiduciary Appointments*, 88 U. PA. L. REV. 671, 676-81 (1940).

[45]T. ATKINSON, *supra* note 1, § 134; Note, *supra* note 43.

[46]*See* Page, *supra* note 5, at 14-16.

[47]96 C.J.S. *Wills* § 1177, at 998-99 (1957), *quoted in* Brown v. Schaffer, 145 Ind. App. at 612-13, 252 N.E.2d at 155.

the court could have reached the same result and created less confusion by applying the identity doctrine and holding that the specific bequest had only changed in form and, therefore, was not adeemed.

In *Pepka v. Branch*,[48] the testator had bequeathed "sixty-five percent of the Pepka Spring Company"[49] to his son and the residue of his estate to his wife. The Pepka Spring Company had been incorporated after the will was executed. The testator's wife claimed that the transformation had adeemed her son's share and that the entire interest in the company passed under the residuary clause. The executor of the estate argued that "the incorporation . . . was merely a change in form and not substance as the new corporation was in almost all respects owned, operated and controlled by the same person in the same manner as before."[50]

The Second District Court of Appeals held that such a change did not constitute an ademption and that the change was merely formal.[51] The court rejected the intent theory applied by the First District Court of Appeals in *Brown*[52] and stated that, although the identity rule has long been the majority rule, "[a]t this point in history, our beloved Indiana is one of the jurisdictions still adhering to the Ancient Rule [intent theory]."[53] The only Indiana case cited for this conclusion, however, is *Brown*.[54] In adopting the mechanistic identity rule, the court surveyed the history and the reasons for its application[55] and concluded: "Notwithstanding Indiana's adoption of the Ancient Rule in *Brown*, . . . it is our opinion that the Modern Rule is more logical, less cumbersome, and easier to apply."[56] The court argued that the use of a subjective method to determine ademption questions would result in the same confusion and inconsistency which originally caused the English and American courts to abandon the intent approach.[57] It emphasized that the search for in-

---

[48]155 Ind. App. 637, 294 N.E.2d 141 (1973).

[49]*Id.* at 641, 294 N.E.2d at 143.

[50]*Id.* at 650, 294 N.E.2d at 148.

[51]*Id.* at 664, 294 N.E.2d at 156.

[52]*Id.* at 661, 294 N.E.2d at 155.

[53]*Id.* at 655, 294 N.E.2d at 151.

[54]*Id.* (citing Brown v. Schaffer, 145 Ind. App. 591, 252 N.E.2d 142 (1969)). By stating that the *Brown* court was "reaffirming" the intent doctrine, the court may have created an opportunity for continued confusion in the Indiana law of ademption. If this is an accurate statement, then the intent doctrine is still law in the First and perhaps the Third Districts, while the identity doctrine applies in the Second District.

[55]155 Ind. App. at 652-58, 294 N.E.2d at 149-53.

[56]*Id.* at 659, 294 N.E.2d at 153.

[57]*Id.*, 294 N.E.2d at 154. The court stated:

> The final, and most important, reason to reject the Ancient Rule is that its utilization effectively emasculates the parol evidence rule and wills statutes which insist on certain formalities in the writing and execution of wills to prevent fraud and perjury. The apparent unlimited scope of the

tent, particularly if allowed to wander from the four corners of the will, would create uncertainty and increase the potential for fraud.[58]

The court also questioned the statement in *Brown* that the intent doctrine is the majority approach[59] and stated: "A careful reading of the *Brown* case indicates a confusion of ademption with the general rules construing wills . . . ."[60] The court purported to overrule *Brown*[61] and the adoption of either the intent doctrine or modified rule by the Indiana courts.[62] The court indicated that any question regarding the testator's intent in an ademption case is to be strictly limited to a determination of the exact property subject to the specific bequest at the time the will was executed.[63] The court next held that the trial court had erred in admitting extrinsic evidence of the testator's intent in changing the form of the business.[64] To avoid the sting of a mechanical application of the identity doctrine, they held that, regardless of the testator's intent, the incorporation had not materially altered the nature of the property in the estate and that it could be identified in substantially the same form as was devised.[65]

> Ancient Rule in seeking the testator's intent relative to ademption permits admission of extrinsic evidence contrary to well accepted rules . . . .

Id. at 659-60, 294 N.E.2d at 154. *See also* Page, *supra* note 5, at 18.

[58]155 Ind. App. at 659-60, 294 N.E.2d at 154.

[59] *Id.* at 661, 294 N.E.2d at 155 (construing Brown v. Schaffer, 145 Ind. App. 59, 252 N.E.2d 142 (1969)).

[60]155 Ind. App. at 661, 294 N.E.2d at 155.

[61]*Id.* "Therefore, to the extent that *In re* Brown's Estate and any other Indiana case are inconsistent with the Modern Rule as here applied, they are expressly overruled." *Id.*

[62]In rejecting the *modified rule* the court was referring to the confusion in *Brown* between the substance-form exception and the intent doctrine. *See* note 43 *supra* and accompanying text.

[63]155 Ind. App. at 658, 294 N.E.2d at 153. The court applied a two-step process:

> The first step consists of establishing the identity of the specific bequest which the testator purports to make under the terms of the will.
>
> The second step is the application of the Modern Rule or the form and substance test.
>
> Once these two steps have been completed, the ademption inquiry ends. Extrinsic evidence is not admissible and any question of the testator's intention becomes irrelevant.

Id. at 658-59, 294 N.E.2d at 153.

[64]*Id.* at 658, 294 N.E.2d at 153. The court stated: "Consequently, a will speaks from the date of its execution in order to ascertain the intention of the testator with respect to the identity of the gift he intended to bequeath. Beyond that point, an inquiry into the intention of the testator is not proper." *Id.*

[65]The court stated: "In the polarity of form and substance, if form is 12:00 o'clock and substance is 1:00 o'clock, the minute hand did not reach quarter after the hour." *Id.* at 664, 294 N.E.2d at 156.

III. Foundations of the Identity Doctrine in Indiana

Although the weight of the authority favors the identity rule,[66] Indiana's law on the question remains in confusion. Significantly, in all three of the cases discussed previously, the courts did not employ other Indiana cases for possible guidance on the question.[67] The above cases also demonstrate the confusion which has developed in distinguishing ademption by extinction from other doctrines of will construction such as ademption by satisfaction, revocation, and the avoidance of intestacy. In all three of these other doctrines the testator's intent is controlling.[68] The confusion of ademption by extinction with these doctrines, plus the absence of a controlling precedent on the question, has left the law in Indiana completely unsettled.

Confusion between the doctrines of ademption by satisfaction and ademption by extinction[69] often results when ademption is discussed generally without the designation of which doctrine is being applied. In *Weston v. Johnson*,[70] this confusion was particularly important because dictum in the case indicated that the identity rule applies in Indiana. In discussing the application of the doctrine of ademption by satisfaction to specific legacies the court stated:

> The word 'ademption,' when applied to specific legacies of stock or of money, or securities for money, must be considered as synonymous with the word 'extinction.' . . . The intention of the testator is immaterial in the ademption of specific legacies, because the subject being extinct at the death of the testator, there is nothing upon which the will can operate . . . .[71]

---

[66]*See* note 10 *supra*.

[67]The court stated in *Brown*: "No Indiana case has come to our attention involving the doctrine of ademption where there has been a change in the subject matter of the specific legacy, but not a complete alienation or destruction thereof." 145 Ind. App. at 615, 252 N.E.2d at 156.

[68]*See* T. Atkinson, *supra* note 1, §§ 133-34; Page, *supra* note 5, at 29-30.

[69]*See* note 1 *supra*.

[70]48 Ind. 1 (1874). The testator had made a specific devise of a quarter section of land to each of his two grandchildren. After the will had been executed, but before his death, the testator gave to his grandson the quarter section specifically devised to his granddaughter. The grandson brought the action to quiet title to the quarter section which he had taken under the will. His sister opposed on the theory that the devise to her brother had been adeemed by satisfaction. The court held that the presumption of ademption by satisfaction was not applicable to specific bequests or in cases in which the testator and the legatee did not stand in loco parentis.

[71]*Id.* at 8-9 (quoting Roper, A Treatise on the Law of Legacies, at 329 (1848)).

While the court was dealing with only the satisfaction question, it is apparent that the granddaughter's specific devise had been extinguished by the conveyance to the grandson. The dictum shows the court's approval of the identity doctrine.[72]

Several commentators have indicated that the major problem with the identity doctrine is not in its mechanical application, but rather in the approach taken by courts in classifying certain types of bequests as specific.[73] Indiana's approach to the classification of bequests problem is set out in *Waters v. Selleck.*[74] In discussing whether the bequest was specific or demonstrative, the court stated that the testator's intent was relevant.[75] While such language may be interpreted as an application of the intent approach, the court allowed evidence of intent only for the purpose of classifying the bequest. The court did not discuss the appropriate rule for deciding the ademption question. After finding the bequest specific, they upheld the lower court's finding that the unpaid portion of the bequest failed.[76]

There are Indiana cases in which specifically devised property has been completely adeemed, and the question presented was whether the remaining assets would pass under the residuary clause or by descent. In *Scher v. Stoffel*,[77] the testator's will had included a specific devise of real estate and had further provided that this real property was not to pass under the residuary clause. Subsequently, the testator sold part of the realty and retained the proceeds in the

---

[72]*See also* Kemp v. Kemp, 92 Ind. App. 268, 154 N.E. 505 (1926) (conveyance of a portion of specifically devised real estate adeemed or revoked the devise and evidence of intent was held to be inadmissible).

[73]Mechem, *supra* note 11, at 576; Warren, *supra* note 4, at 326; *Ademption*, *supra* note 11, at 750.

[74]201 Ind. 593, 170 N.E. 20 (1930). The testator had bequeathed "five thousand dollars, ($5,000.00) in cash out of the Burbank Estate," but the estate had only $2,500. *Id.* at 594, 170 N.E. at 20. The question presented was whether the $5,000 bequest was specific, and, therefore, adeemed pro tanto, or whether it was demonstrative and entitled the legatee to participate in the estate's general assets.

[75]*Id.* at 599, 170 N.E. at 22. The court stated:

> But whether a legacy is general, specific or demonstrative is not governed by any arbitrary rules, Rood, Wills § 707, it depends entirely upon the intention of the testator, and the rules of construction contended for by appellant do not control as against the intent of the testator when that intent is ascertained.

Id. (citation omitted). *See also* Garrison v. Day, 36 Ind. App. 543, 76 N.E. 188 (1905).

[76]201 Ind. at 597, 170 N.E. at 21. "That if the estate of Andrew J. Burbank, deceased, shall fail to yield Five Thousand Dollars ($5,000.00) the legacy will fail to the extent of the deficit."

[77]115 Ind. App. 195, 58 N.E.2d 118 (1944).

form of traceable bank deposits. The question was whether the cash passed under the residuary clause or by intestacy. The court assumed, without discussion, that the specific bequest was adeemed, but admitted intra-will evidence of the testator's intent to determine whether the property passed under the will or by law. In so holding the court stated: "'A residuary clause will pass proceeds from the ademption of specific legacies, in whatever form such proceeds exist, *unless such a disposition is contrary to the manifest intention of the testator.*'"[78] The testator's intent was not relevant in determining whether the property had been adeemed, but only in determining whether it was to pass under the will. If the intent doctrine had been the law in Indiana, the specific devisee might have avoided the intestacy question altogether because the proceeds of the sale were traceable and the will contained an expression of intent that the realty not pass under the residuary clause.

Coon v. Coon[79] also stands for the proposition that a residuary clause will dispose of the proceeds resulting from the ademption of a specific bequest unless there is a manifestation of contrary intent. Does such a statement indicate that Indiana follows an intent approach? It is not clear since *Coon* did not address ademption by extinction.[80] The court in *Coon* looked to the will to determine only whether the testator intended for the property in question to pass under the will or by intestacy and did not hold that the testator's intent was relevant in an ademption case.[81] Had ademption by extinction been the issue before the court and the intent rule applied, the property probably would not have passed under the residuary clause. Under the identity doctrine, however, the result would have been the same. Neither *Scher* nor *Coon* clearly adopted the intent

---

[78]*Id.* at 199, 58 N.E.2d at 120 (quoting 69 C.J. *Wills* § 1484 (1934)).

[79]187 Ind. 478, 118 N.E. 820 (1918).

[80]The testator had devised "all my real estate" followed by a specific description of the real property he owned at the time the will was executed. His wife was the only residuary legatee. He subsequently sold part of the specifically devised realty and purchased another plot. The wife claimed that the after-acquired property passed to her under the specific devise and, therefore, was not subject to sale and contribution to satisfy other general legacies. She argued that such general legacies were to be paid only from the personalty existing at the testator's death, and that the testator had not intended for the realty to pass by the residuary clause or by law. The general legatee claimed, alternatively, that the after-acquired property should either pass by the residuary clause and, thereby, be subject to contribution, or pass outside the will. *Id.* at 480,, 118 N.E. at 821.

[81]Once the court determined that the property would pass under the will the issue of ademption was no longer relevant because the testator's wife was the specific and residuary legatee. *Id.* at 483-84, 118 N.E. at 821-22.

rule in Indiana and both held only that the testator's intent is relevant in determining whether the property passes by will or by intestacy.

Some of the confusion in Indiana concerning ademption can be traced to cases which discuss the revocation of a specific bequest of real estate due to a subsequent devise.[82] Under the common law, a devise of real estate was revoked if the testator was not in possession of the realty from the time of execution of the will until death.[83] Indiana, like most jurisdictions, has altered the common law rule by statute.[84] In *Swails v. Swails*,[85] the court determined that the testator's intent was relevant in determining whether the specific devise had been revoked.[86] Similarly, in *Simmons v. Beazel*,[87] a revocation case, the court held intent was relevant.[88] In *Simmons*, the specific devise had been transformed into another traceable asset. Because the decedent's wife was both the specific and

---

[82]*See generally* T. ATKINSON, *supra* note 1, § 134, at 743; Page, *supra* note 5, at 29-30; Smith, *supra* note 12, at 229.

[83]Bowen v. Johnson, 6 Ind. 110 (1854); Wolf v. Wolf, 73 Ind. App. 221, 127 N.E. 152 (1920).

[84]IND. CODE § 29-1-6-1 (1976) provides in pertinent part:

> In the absence of a contrary intent appearing therein, wills shall be construed as to real and personal estate in accordance with the following rules:
>
> (a) Any estate, right or interest in land or other things acquired by the testator after the making of his will shall pass thereby and in like manner as if title thereto was vested in him at the time of making the will.

Id. § 29-1-5-6 provides in pertinent part:

> No will in writing, nor any part thereof, except as in this act provided, shall be revoked, unless the testator, or some other person in his presence and by his direction, with intent to revoke, shall destroy or mutilate the same; or such testator shall execute other writing for that purpose, signed subscribed and attested as required in section 503 [29-1-5-3].

[85]98 Ind. 511 (1884) (holding that a partial alienation of a specific devise did not revoke the entire devise and that the remaining portion passed under the will). The discussion of revocation necessarily avoids the question of ademption by extinction, although such a question was relevant to the portion of the specific devise absent from the testator's estate at his death. *See also* Wolf v. Wolf, 73 Ind. App. 221, 127 N.E. 152 (1920).

[86]98 Ind. at 515.

[87]125 Ind. 362, 25 N.E. 344 (1890).

[88]The testator had specifically devised a life estate in certain realty to his wife with a remainder to his children and bequeathed "all the personal property which I may have at my death" to his wife. After the will was executed he sold the realty, but held a promissory note for the unpaid balance. His heirs claimed the conveyance had revoked the devise and, therefore, the proceeds should pass by descent. Without reference to statute, the court stated that, although the testator's intent was relevant, there was no evidence in the will of an intent to revoke. *Id.* at 366, 25 N.E. at 345.

residuary legatee, however, the ademption question was not raised.[89] In *Sturgis v. Work*,[90] the testator devised by specific description land he did not own. The remainder of his estate was to pass under the residuary clause. The specific devisee attempted to present evidence that the description was a mistake. Although the case was determined on an evidentiary basis, the result was that a specific devise was adeemed without regard to the testator's intent.[91] If Indiana had followed the intent rule, the specific devisee could have argued that such evidence was admissible to show the testator's intent at the time the will was executed.[92] Possibly these cases have been misinterpreted as standing for the proposition that intent is admissible in determining whether a bequest has been adeemed by extinction.

While the rule governing ademption by extinction is still an open question, the preceding cases provide some guidance. One of the difficulties with the opinions in *Brown* and *Pepka* is the lack of reference to other relevant Indiana cases[93] and the assumption that Indiana follows the intent rule. These cases, while not directly addressing the question of ademption, show a pattern. Indiana courts have searched for intra-will indications of a testator's intent when presented with classification of bequests, ademption by satisfaction, revocation, or possible intestacy. Aside from *Brown*, none of the relevant Indiana cases have held that intra-or extra-will evidence of intent is admissible to show an ademption by extinction. The dictum in *Weston*[94] also offers substantial support for the identity rule. While the Indiana Courts of Appeal are currently divided on the appropriate rule, these antecedent cases, at least impliedly, accept the identity rule.

IV. Possible Approaches to Ademption Questions

Whichever doctrine is followed in Indiana, the courts will undoubtedly experience problems similar to those in other states. A brief look at cases in other jurisdictions indicates that neither rule

---

[89]It is also clear that if the specific provision had been revoked under the common law rule any question of ademption by extinction would have been eliminated because there would not have been a valid specific bequest under which the property could pass even if the testator had not intended that the property be adeemed.

[90]122 Ind. 134, 22 N.E. 996 (1889).

[91]*Id.* at 135, 22 N.E. at 996. The court held there was no error in refusing to admit such evidence and that the property passed under the residuary clause. *Id.*

[92]*See* note 64 *supra*.

[93]*See* note 67 *supra* and accompanying text.

[94]*See* note 71 *supra* and accompanying text.

has produced completely satisfactory results.[95] A brief analysis of the advantages, disadvantages, and methods of the two rules may clarify some of the problems.

The intent doctrine may fulfill the testator's intent, but it also raises important evidentiary questions which may lead to continued uncertainty and confusion. What does a search for the testator's intent mean in an ademption case? Will evidence of the deceased's intent be limited to the generally accepted rules for the construction of wills, or will extrinsic evidence be allowed? *Brown* does not give a clear answer,[96] but the authorities cited therein consistently confine the search to the four corners of the instrument and the situation and circumstances at the time of execution.[97] These rules of construction have been applied conservatively in Indiana[98] and the courts have continued to protect against infringements on the Statute of Wills and Statute of Frauds.[99] It is also important to note that in cases of ademption by satisfaction, where the testator's intent is controlling, Indiana courts have confined extra-will evidence to situation and circumstances at execution.[100] If Indiana decides to follow the intent rule in an extinction case, the inquiry should be similarly limited.

Under the intent doctrine, even if the resulting property is traceable, an ademption may still occur.[101] Where a testator has voluntarily removed property from the estate and evidence of intent is limited to an examination of the will, it is possible that the property will not be adeemed and, thus, may be contrary to the testator's actual intent.[102] Where the transfer is the result of an involuntary act, an intra-will search is more likely to correspond with a testator's true intent. Unless extrinsic evidence is admitted to determine the testator's actual intent at the time of transfer, however, the intent doctrine may produce results equally arbitrary as those of the identity rule.[103] The intent doctrine may also raise a

---

[95]Page, *supra* note 5; Warren, *supra* note 4.

[96]145 Ind. App. at 617, 252 N.E.2d at 149-50.

[97]*See* notes 33-35 *supra* and accompanying text.

[98]*See, e.g.*, Hauck v. Second Nat'l Bank, 153 Ind. App. 245, 286 N.E.2d 852 (1972).

[99]*See, e.g.*, Pierce v. Farmers State Bank, 222 Ind. 116, 51 N.E.2d 480 (1943); Beck v. Dickinson, 99 Ind. App. 463, 192 N.E. 899 (1934).

[100]*See* Roquet v. Eldridge, 118 Ind. 147, 20 N.E. 733 (1889); Brown v. Crossley, 69 Ind. 203 (1879); Weston v. Johnson, 48 Ind. 1 (1874); Clendening v. Clymer, 17 Ind. 155 (1861); Scher v. Stoffel, 115 Ind. App. 195, 58 N.E.2d 118 (1944); Kemp v. Kemp, 92 Ind. App. 268, 154 N.E. 505 (1926).

[101]*In re* Estate of Resler, 43 Cal. 2d 726, 278 P.2d 1 (1955); *In re* Estate of Hagberg, 276 Cal. App. 2d 622, 81 Cal. Rptr. 107 (1969); *See generally Ademption by Extinction in California*, *supra* note 13.

[102]*Ademption*, *supra* note 11, at 748; *See also*, PAGE, *supra* note 1, § 54.15.

[103]Paulus, *supra* note 11, at 227-33.

question whether a grant of the traceable or equivalent assets will conflict with the testator's intent to provide for general or residuary legatees.[104] The conflict is inevitable; if the court is willing to allow a subjective search for intent, results will lack consistency, but, if intent is irrelevant, results may be unjust.

Some courts, applying a *fund theory*, have attempted to determine from an examination of the will whether the testator intended to confer an economic benefit or a unique item upon the legatee.[105] Under this approach unique items would be adeemed to the extent they were not present in the testator's estate at his death, while an "economic benefit" would pass to the specific legatee if it was traceable. This procedure is similar to Mechem's proposal that only specific bequests of unique items be subject to ademption and that specific legacies of assets be construed as general and therefore not subject to ademption.[106]

A return to, or an adoption of, the intent approach might be undesirable and could result in troublesome uncertainty.[107] Logically extended, such a doctrine would require tracing of the proceeds of a transferred bequest or devise whenever the testator's "intent," as constructed by the court, so indicated.[108] The admission of extrinsic evidence in this examination could produce results that would violate the formally expressed intent of the testator and encourage litigation.

Although the identity doctrine is an easier and, potentially, a more consistent rule to apply, it can also produce harsh results.[109] Applied mechanically, it can result in a distribution completely contrary to the *expressed* intent of the testator.[110] However, the ap-

---

[104]*See Ademption, supra* note 11, at 749.

[105]Willis v. Barrow, 218 Ala. 549, 119 So. 678 (1929); Gray v. McCausland, 314 Mass. 743, 51 N.E.2d 441 (1943). *See generally Ademption, supra* note 11, at 750; Note, *supra* note 43, at 1089.

[106]Mechem, *supra* note 11, at 576.

[107]"Inevitably, the intent criterion proved unworkable." Mechem, *supra* note 11, at 562.

[108]*See* 18 CAL. L. REV. 711 (1930). *But see* Note, *Wills: Ademption of Specific Legacies and Devises*, 43 CAL. L. REV. 151, 154 (1955).

[109]*E.g.*, Wyckoff v. Perrine's Ex'r, 37 N.J. Eq. 118 (Ch. 1883); Ametrano v. Downs, 170 N.Y. 388, 63 N.E. 340 (1902); *In re* Barrow's Estate, 103 Vt. 501, 156 A. 408 (1931); *In re* Kamba's Estate, 230 Wis. 246, 282 N.W. 570 (1938). T. ATKINSON, *supra* note 1, § 134, at 742; *See generally* PAGE, *supra* note 1, § 54.15, at 266.

[110]Connecticut Trust & Safe Deposit Co. v. Chase, 75 Conn. 683, 55 A. 171 (1903); *In re* Dungan's Estate, 30 Del. Ch. 628, 62 A.2d 509 (Orphans Ct. 1948); Beck v. McGillis, 9 Barb. Ch. 35 (N.Y. Sup. Ct. 1850); *In re* Barry's Estate, 208 Okla. 18, 252 P.2d 437 (1952).

proach of courts in adopting this rule and then endeavoring to find exceptions for harsh cases has also been criticized.[111]

Under the identity doctrine a substantial change in the bequeathed property will operate as an ademption, but, if the change is merely one of form or location, or is minor in character, the bequest may still pass to the specific legatee.[112] If the testator is more specific in the description and gives the particular characteristics, location, or quality of the object, the bequest will be adeemed.[113] This substance-form test is particularly applicable where the property involved is a security, an interest in a business, or another intangible asset.[114]

A second method of avoiding the doctrine is by the classification of bequests. Since ademption by extinction applies only to specific bequests,[115] the character of the bequest must be determined before the doctrine is applicable. Perhaps, as a result of the identity rule, Indiana courts have expressed a preference for finding general, rather than specific, legacies.[116] The rules for classification provide that the determination should be made in accordance with the testator's intra-will manifestation of intent.[117] This provides an opportunity for the court to examine the testator's intent before the ademption argument is raised. This exception is particularly appropriate where the bequest is not unique and is traceable.[118]

Another exception to the identity doctrine is the time-of-death construction.[119] Although a will normally speaks only at the death of the testator,[120] its language may be determined in light of the cir-

---

[111]"It is of course to be regretted that courts make rules and principles with the operation of which they are so dissatisfied from the outset that they feel compelled to make other equally unsatisfactory rules as a means of evading the first set of rules."

Page, *supra* note 5, at 28. *See also* Paulus, *supra* note 11, at 197-207.

[112]T. ATKINSON, *supra* note 1, § 134, at 747-48; Note, *supra* note 43, at 1085.

[113]Succession of Canton, 144 La. 113, 80 So. 218 (1918); Hastings v. Bridge, 86 N.H. 247, 166 A. 273 (1933).

[114]*See generally* Evans, *Effect of Corporate Transformation Upon Ademption, Lapse, and Fiduciary Appointments*, 88 U. PA. L. REV. 671 (1940); Mechem, *supra* note 11, at 566-76; Note, *supra* note 43, at 1089.

[115]*See* note 2 *supra*.

[116]Waters v. Selleck, 201 Ind. 593, 170 N.E. 20 (1930); American Fletcher Nat'l Bank & Trust Co. v. American Fletcher Nat'l Bank & Trust Co., 161 Ind. App. 166, 314 N.E.2d 810 (1974). *See also* T. ATKINSON, *supra* note 1, at 746.

[117]*See* notes 74-76 *supra* and accompanying text. *See, e.g.*, W. BORLAND, WILLS & ADMINISTRATION § 119 (1915); Evans, *supra* note 119, at 671; Paulus, *Special and General Legacies of Securities; Whither Testator's Intent*, 43 IOWA L. REV. 467 (1958).

[118]Paulus, *supra* note 11, at 206.

[119]T. ATKINSON, *supra* note 1, at 746.

[120]*Id.* at 433-35, 470-73, 746, 815.

cumstances surrounding the testator when the will was executed.[121] Under the identity rule a testator's intent is relevant only at the time the will was executed.[122] Therefore, where it could be shown that the testator intended to make a specific bequest of property he owned at the time of the will's execution and the specific item was not present in his estate at death, the bequest would be adeemed. The time-of-death exception, however, allows a generic gift such as "my stock" or "my interest" to include all items which fall within the general description and are in the testator's possession at his death. This interpretation will save a devise which would have been adeemed if the decedent's intent, when the will was executed, was relevant.[123]

This exception might be available in Indiana because some courts have held that the will speaks only at the date of death[124] and operates only on those assets in the estate at death.[125] Indiana statutes which allow a will to pass after-acquired property[126] also support this interpretation. The *Brown* court, however, argued that the time-of-death construction applied only to after-acquired property, and not to ademption cases.[127] This approach was also rejected by the *Pepka* court's statement that although "[t]he will becomes

---

[121]*Id.* at 810. *See, e.g.*, Peirce v. Farmers State Bank, 222 Ind. 116, 51 N.E.2d 480 (1943); Conover v. Cade, 184 Ind. 604, 112 N.E. 7 (1916); Corey v. Springer, 138 Ind. 506, 37 N.E. 322 (1894); Stevenson v. Druley, 4 Ind. 519 (1853).

[122]*See* note 63 *supra* and accompanying text.

[123]Under this approach if the testator makes a specific bequest of "my stock" and owns X stock on the date of execution but Y stock at death, the bequest is not adeemed—not as a result of intention, but because the will operates only upon the property held at death and the Y stock falls within the specific description. Arguably, when the specific bequest is of a more personal nature, such as "my diamond" or "my gold watch," the exception is less appropriate. *See* Milton v. Milton, 193 Miss. 563, 10 So. 2d 175 (1942); *In re* Charles' Estate, 3 App. Div. 2d 119, 158 N.Y.S.2d 469 (Sup. Ct. 1957); *In re* Lusk's Estate, 336 Pa. 465, 9 A.2d 363 (1939). *Contra*, Schildt v. Schildt, 201 Md. 10, 92 A.2d 367 (1952); *In re* Morris' Estate, 11 Misc. 2d 457, 169 N.Y.S.2d 881 (1957).

[124]Shriver v. Montgomery, 181 Ind. 108, 103 N.E. 945 (1914); Heaston v. Kreig, 167 Ind. 101, 77 N.E. 805 (1906); Brown v. Critchell, 110 Ind. 31, 11 N.E. 486 (1887).

[125]Haxton v. McClaren, 132 Ind. 235, 31 N.E. 48 (1892).

[126]IND. CODE § 29-1-6-1(a) & (b) (1976).

[127]145 Ind. App. at 616, 252 N.E.2d at 157. The court stated:

> When we say a will speaks from the date of the death of the testator, we simply mean that a will operates upon all the property in the testator's estate at the time of his death, and is not restricted solely to that property he may have owned at the time he made his will. Vol. 29, I.L.E., Wills, Sec. 192, p. 350. It has no connection with the doctrine of ademption. It was formulated as a rule of law to cover property acquired by the testator after he made his will, and which was a part of his estate at the time of his death.

Id.

operative or effective after it is probated and speaks from that date as an affective instrument, . . . for purposes of ademption it is construed as of the date of execution to identify the subject matter of the gift."[128]

A similar escape device is the use of "special language" in a will which does not alter the nature of the bequest, but makes its quantity or quality uncertain.[129] Where the will provides that the legatee is to have an inclusive gift such as "the proceeds,"[130] "my interest,"[131] or "my business,"[132] the courts have circumvented the identity rule by allowing the introduction of evidence to trace the bequest and to clarify any ambiguity regarding the amount in question. Such an inclusive description was used in *Brown*,[133] but, because the court applied the intent rule, the exception was not necessary.[134]

Some states deviate from the identity doctrine when the results would be grossly unfair, yet refuse to adopt an intent approach.[135] Although California has not completely abandoned the identity rule, its current position is exceptionally flexible and indicates a preference for the intent approach.[136] Iowa has moderated the identity rule by employing a two-pronged test in harsh cases.[137] However,

---

[128]155 Ind. App. at 658, 294 N.E.2d at 153.

[129]T. ATKINSON, *supra* note 1, at 746; G. THOMPSON, THE LAW OF WILLS § 519 (3d ed. 1947); Paulus, *supra* note 11, at 203-05.

[130]*In re* Manshaem's Estate, 207 Mich. 1, 173 N.W. 483 (1919); *In re* Estate of Caldwell, 6 Misc. 2d 110, 160 N.Y.S.2d 375 (Sup. Ct. 1957). *See also In re* Dublin's Estate, 375 Pa. 599, 101 A.2d 731 (1954).

[131]Mee v. Cusineaus, 213 Ark. 61, 209 S.W.2d 445 (1948); Mitchell v. Mitchell, 208 Ark. 478, 187 S.W.2d 163 (1945); Weed v. Hoge, 85 Conn. 490, 83 A. 636 (1912).

[132]*In re* Gerlach's Estate, 364 Pa. 207, 72 A.2d 271 (1950) (partnership to corporation); Wiggins v. Cheatham, 143 Tenn. 406, 225 S.W. 1040 (1920) (business received).

[133]"[A]ll of my right, title and interest," 145 Ind. App. at 596, 252 N.E.2d at 145.

[134]It is possible that the *Brown* court confused this exception to the identity rule with a complete adoption of the intent approach. *See* notes 43-47 *supra* and accompanying text.

[135]This approach has been followed when a testator had no chance to amend his will or make his intention known after the specific property ceased to be a part of his estate. *See, e.g.*, Wolfe v. Eckhoff, 208 N.W.2d 923 (Iowa 1973) (insurance proceeds from "common disaster"); Walsh v. Gillespie, 338 Mass. 278, 154 N.E.2d 906 (1959) (sale of stock by conservator). *Contra, In re* Barry's Estate, 208 Okla. 8, 252 P.2d 437 (1952). For a discussion of whether insurance proceeds should pass to a specific legatee, *see* 4 U. KAN. L. REV. 465 (1956); 29 S. CAL. L. REV. 249 (1956).

[136]The present rule in California is that there will be no ademption without proof that the testator intended to destroy the specific bequest or devise. *In re* Mason's Estate, 62 Cal. 2d 213, 42 Cal. Rptr. 13, 397 P.2d 1005 (1965); *In re* Estate of Holmes, 233 Cal. App. 2d 464, 43 Cal. Rptr. 693 (1965), *noted in Ademption by Extinction in California, supra* note 13, at 468. *Contra, In re* Babb's Estate, 200 Cal. 252, 252 P. 1039 (1927) (following identity rule strictly).

[137]This approach applies only where the specified asset has changed substantially in form, but has not been extinguished. An initial determination of the testator's intent

such a "no rule" approach has been criticized as the worst possible method because it does not proceed upon general principles and produces inconsistent results.[138] While a general trend toward the intent doctrine has been noted, the identity doctrine continues to be the majority rule[139] and its numerous exceptions will undoubtedly continue to be used in order to avoid harsh results.

VI. Statutory Alternatives

The confusion and occasionally unreasonable results experienced under the identity doctrine have been modified by legislation in several states.[140] Generally, these statutes deal with only one particular problem and raise a presumption that in such an instance the testator did not intend an ademption. Some statutes operate only where the alienation occurs as a result of the following: A sale by guardian;[141] a condemnation proceeding;[142] accident or theft;[143] exchanges of property of like character;[144] subsequent contract of sale;[145] or any act by the testator that alters, but does not "wholly divest" his estate or interest in the devised asset.[146]

The most comprehensive statutes are found in Oregon[147] and Wisconsin.[148] These lengthy and complex statutes attempt to cover all of the special situations in which the identity rule may produce undesirable results, but they may actually provide an equally inflexible approach to the problem. Similar to the Wisconsin and Oregon approaches, sections 2-607 and 2-608 of the Uniform Probate Code list certain situations in which specific bequests will be presumed not to adeem.[149] Under all three of these methods only intra-will evidence of intent is admissible.

---

is made from both intrinsic and extrinsic evidence. If the intent is clear, it is followed; if it is ambiguous, the identity rule applies. *See* 57 Iowa L. Rev. 1211, 1214 (1972).

[138]Page, *supra* note 5, at 36-37.

[139]Warren, *supra* note 4, at 324-25.

[140]*See* Rees, *American Wills Statutes: II*, 46 Va. L. Rev. 856 (1960).

[141]Ind. Code § 29-1-18-44 (1976); Ohio Rev. Code Ann. § 2127.38. (Page 1968) (real property only).

[142]Or. Rev. Stat. § 112.385 (1975); Wis. Stat. Ann. § 853.35(4) (West 1971).

[143]N.Y. Est., Powers & Trusts Law § 3-4.5 (McKinney 1967) (passing insurance proceeds).

[144]Ga. Code Ann. § 113-818 (1975).

[145]Or. Rev. Stat. § 112.385(4) (1975).

[146]Cal. Prob. Code § 78 (West 1956); Ohio Rev. Code Ann. § 2107.36 (Page 1976); N.Y. Est., Powers & Trusts Law § 3-4.3 (McKinney 1967).

[147]Or. Rev. Stat. § 112.385 (1975).

[148]Wis. Stat. Ann. § 853.35 (West 1971).

[149]Uniform Probate Code § 2-607:

(a) If the testator intended a specific devise of certain securities rather than the equivalent value thereof, the specific devisee is entitled only to:

Kentucky has taken an exceptionally broad approach to the problem and has created a general presumption against the ademption of specific legacies.[150] This statutory presumption only arises when a specific bequest is in favor of an "heir." Extrinsic evidence is allowed to rebut the presumption. Virginia has taken the opposite approach and presumes, absent a contrary expression in the will,

---

(1) as much of the devised securities as is a part of the estate at the time of the testator's death;

(2) any additional or other securities of the same entity owned by the testator by reason of action initiated by the entity excluding any acquired by exercise of purchase options;

(3) securities of another entity owned by the testator as a result of a merger, consolidation, reorganization or other similar action initiated by the entity; and

(4) any additional securities of the entity owned by the testator as a result of a plan of reinvestment if it is a regulated investment company.

(b) Distributions prior to death with respect to a specifically devised security not provided for in subsection (a) are not part of the specific devise.

Id. § 2-608:

(a) If specifically devised property is sold by a conservator, or if a condemnation award or insurance proceeds are paid to a conservator as a result of condemnation, fire, or casualty, the specific devisee has the right to a general pecuniary devise equal to the net sale price, the condemnation award, or the insurance proceeds. This subsection does not apply if subsequent to the sale, condemnation, or casualty, it is adjudicated that the disability of the testator has ceased and the testator survives the adjudication by one year. The right of the specific devisee under this subsection is reduced by any right he has under subsection (b).

(b) A specific devisee has the right to the remaining specifically devised property and:

(1) any balance of the purchase price (together with any security interest) owing from a purchaser to the testator at death by reason of sale of the property);

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on fire or casualty insurance on the property; and

(4) property owned by testator at his death as a result of foreclosure, or obtained in lieu of foreclosure, of the security for a specifically devised obligation.

[150]KY. REV. STAT. § 394.360 (1970), provides in pertinent part:

(1) The conversion of money or property or the proceeds of property, devised to one (1) of the testator's heirs, into other property or thing, with or without the assent of the testator, shall not be an ademption of the legacy or devise unless the testator so intended; but the devisee shall have and receive the value of such devise, unless a contrary intention on the part of the testator appears from the will, or by parol *or other evidence.*

(2) The removal of property devised shall not operate as an ademption, unless a contrary intention on the part of the testator is manifested in a like manner.

(Emphasis added.)

that such devises will fail.[151] While Kentucky allows extrinsic evidence to rebut the presumption, even this approach may produce results as arbitrary as the identity rule. One proposal has been to allow extrinsic evidence to determine the burden of proof.[152] This procedure has not been adopted in any of the existing statutes and would undoubtedly be met by the same objections that are raised regarding the intent doctrine.[153] Absent some uniform statutory reform, the law of ademption by extinction is likely to remain confused.[154]

VII. CONCLUSION

The Indiana Supreme Court would follow the majority rule if presented with an ademption case. Despite the somewhat confusing and conflicting approaches taken by the Indiana Courts of Appeal, the rationales and dicta from related cases show, at least impliedly, an acceptance of the identity rule. Only the First District Court of Appeals has applied the intent approach, and it is suggested that such application is erroneous.[155] The First District was clearly wrong in assuming that the intent theory was the majority rule. The categorical statement that Indiana had followed this approach is also misleading. The only Indiana case cited for this proposition was *Powell* which, arguably, is an application of the identity rule.[156] However, if Indiana has now "adopted" a mechanical rule, as in-

---

[151]VA. CODE § 64.1-65 (1973), provides in pertinent part:

> Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised in any devise in such will, which shall fail or be void or otherwise incapable of taking effect, shall be included in the residuary devise, if any, contained in such will.

[152]Certain categories which could be used in the determination of whether such an act is sufficiently extinctive or dispositive to place the burden of proof on the specific legatee are:

> (1) testator's role in the change—whether active or passive; (2) the character of the change—whether substantial or merely formal; (3) disposition of the proceeds, if any—whether traceable or not; (4) opportunity of testator to change his will—whether a long or short time has elapsed between the change and the testator's death; and (5) miscellaneous circumstances peculiar to the facts of the particular case.

Ademption by Extinction in California, *supra* note 13, at 464.

[153]Such inquiries are "productive of endless uncertainty and confusion . . . ." Humphreys v. Humphreys, 30 Eng. Rep. 85, 85 (1789).

[154]Statutory reform has long been advocated. Page, *supra* note 5, at 36-38. Others argue that the courts should reform the law by construing legacies as general whenever possible, Mechem, *supra* note 11, at 576. A third approach favors judicial or statutory admission of extrinsic evidence of the testator's intent. Paulus, *supra* note 11, at 227-33.

[155]*See* notes 31-42 *supra*.

[156]*See* notes 19-28 *supra*.

dicated in *Pepka*, and overruled the intent theory "adopted" in *Brown*, the courts may be heading in the opposite direction of other jurisdictions. Several states appear to be establishing wider exceptions to the identity rule, while others have abandoned the doctrine judicially or by statute.[157] Such a trend may result from a less restrictive judicial attitude toward the admission of extrinsic evidence of intent[158] or from a desire to avoid harsh results. While some commentators favor continued judicial supervision,[159] others argue that the approach will only lead to continued confusion, uncertainty, and increased litigation.[160] It remains to be seen how the California and Iowa approaches work and whether the greater willingness to admit extrinsic evidence will produce consistent results.[161]

Because there are so few ademption by extinction cases in Indiana, the need for statutory reform may not be urgent, but would be helpful. The absence of case law did not prevent the legislature from expressing its preference in the guardianship situation.[162] A statute would remove some of the confusion surrounding the problem. Although any statutory alternative could create an approach as mechanical as the identity rule, the Uniform Probate Code approach presents a reasonable solution.[163] This method raises a presumption similar to that found in Indiana's abatement,[164] exoneration,[165] and contribution statutes.[166] Raising a statutory presumption against the ademption of specific legacies in particular circumstances would significantly reduce the potential for harsh results under the identity rule. The presumption should be rebuttable by intra-will evidence of intent and by the testator's situation at the will's execution. The statute would not displace the common law exceptions to the identity doctrine so that where the statute did not cover the situation a specific bequest might still be saved judicially.

This type of statute has the same weaknesses as any approach which does not allow extrinsic evidence, other than intra-will evidence, in order to determine actual intent. However, there is no

---

[157]*See* notes 136-37, 140-50 *supra*, *see also* Paulus, *supra* note 11, at 195.

[158]*See generally* Note, *Ascertaining the Testator's Intent: Liberal Admission of Extrinsic Evidence*, 22 HASTINGS L.J. 1349 (1971).

[159]Warren, *supra* note 4, at 327.

[160]Mechem, *Why Not A Modern Wills Act?*, 33 IOWA L. REV. 501, 515 (1948); Page, *supra* note 5, at 37-38; Paulus, *supra* note 11, at 233.

[161]*See* notes 136-37 *supra*.

[162]*See* note 40 *supra*.

[163]*See* note 149 *supra*.

[164]IND. CODE § 29-1-17-3 (1976).

[165]*Id.* § 29-1-17-9.

[166]*Id.* § 29-1-17-4.

reason why the search for intent in an ademption case should be any broader than for any other situation involving the interpretation of a will. The same constraints and policies should apply. It would also seem advisable to create a general statutory presumption against the ademption of specific legacies and then only allow intra-will evidence of intent. There are undoubtedly many instances in which the will indicates a clear intent to make a specific bequest and, yet, the testator has intentionally disposed of the property in order to defeat this bequest. Under these circumstances only the introduction of extrinsic evidence would achieve a result consistent with the testator's intent. Where the transfer is involuntary, however, a statute would present less risk of inconsistent results. In any event, it is reasonably certain that, absent some type of statutory reform, the law of ademption by extinction in Indiana will remain a contradictory, confusing and shifting area.

J. BRADLEY SCHOOLEY

Trial Rule 69(E): Proceedings Supplemental to Execution

I. Introduction

In 1969 the Indiana Supreme Court adopted the Indiana Rules of Trial Procedure.[1] Proceedings supplemental to execution are embodied in Trial Rule 69(E).[2] The new rule greatly simplifies the procedure applicable to a judgment creditor's attempt to enforce its judgment. A verified motion, filed in the court where the judgment was rendered, must generally allege that the plaintiff owns the judgment against the defendant and that the plaintiff has no cause to believe that levy of execution against the defendant will satisfy the

---

[1] Ind. R. Tr. P.

[2] *Id.* at 69(E) provides:

> Proceedings supplemental to execution. Notwithstanding any other statute to the contrary, proceedings supplemental to execution may be enforced by verified motion or with affidavits in the court where the judgment is rendered alleging generally
>
> (1) that the plaintiff owns the described judgment against the defendant;
>
> (2) that the plaintiff has no cause to believe that levy of execution against the defendant will satisfy the judgment;
>
> (3) that the defendant be ordered to appear before the court to answer as to his non-exempt property subject to execution or proceedings supplemental to execution or to apply any such specified or unspecified property towards satisfaction of the judgment; and,
>
> (4) if any person is named as garnishee, that garnishee has or will have specified or unspecified nonexempt property of, or an obligation owing to the judgment debtor subject to execution or proceedings supplemental to execution, and that the garnishee be ordered to appear and answer concerning the same or answer interrogatories submitted with the motion. If the court determines that the motion meets the foregoing requirements it shall, ex parte and without notice, order the judgment debtor, other named parties defendant and the garnishee to appear for a hearing thereon or to answer the interrogatories attached to the motion, or both. The motion, along with the court's order stating the time for the appearance and hearing or the time for the answer to interrogatories submitted with the motion, shall be served upon the judgment debtor as provided in Rule 5, and other parties and the garnishee shall be entitled to service of process as provided in Rule 4. The date fixed for appearance and hearing or answer to interrogatories shall be not less than twenty (20) days after service. No further pleadings shall be required, and the case shall be heard and determined and property ordered applied towards the judgment in accordance with statutes allowing proceedings supplementary to execution. In aid of the judgment or execution, the judgment creditor or his successor in interest of record and the judgment debtor may utilize the discovery provisions of these rules in the manner provided in these rules for discovery or as provided under the laws allowing proceedings supplemental.

judgment. The motion must move that the defendant be ordered to appear before the court to answer as to his non-exempt property or to apply any such property toward satisfaction of the judgment.[3]

The notice requirement of Trial Rule 69(E) is unclear in Indiana.[4] Trial Rule 69(E) is indefinite as to whether the judgment creditor is required to give notice to the judgment defendant; if notice is required, the Rule does not specify the type of notice necessary.[5]

While proceedings supplemental are an important aid to the judgment creditor seeking to satisfy a judgment, additional assistance is provided by *Union Bank and Trust Co. v. Vandervoort*.[6] In *Vandervoort*, decided under pre-1969 statutory law relating to proceedings supplemental,[7] the Indiana Supreme Court held a bank liable to the judgment creditor because, after having been served with process in proceedings supplemental, it honored the request of its depositor, the judgment debtor, to withdraw money from his account.[8] This decision, in effect, requires a bank to freeze the judgment debtor's bank account, at least up to the amount of the judgment, when it is served with a motion for proceedings supplemental and interrogatories. If the bank fails to act, it will be liable to the judgment creditor.

The relationship between a bank and its depositor is generally that of debtor-creditor.[9] If the bank is in error in freezing the account, it will be liable to its depositor for damages proximately caused by the wrongful dishonor of a check presented for payment on the account[10] unless the bank has been notified of an adverse claim to the depositor's bank account.[11] There is no Indiana case law directly on point in this area.[12] Whether or not proceedings supplemental to execution come within the purview of Indiana Code section 28-1-20-1(a)[13] will be discussed in this Note.

This Note will examine proceedings supplemental to execution as governed by Trial Rule 69(E), specifically as it relates to notice to

---

[3]*Id.*

[4]*Id.*

[5]*See* Citizen's Nat'l Bank v. Harvey, 339 N.E.2d 604 (Ind. Ct. App. 1976). The court held that notice was required, but imposed no penalty for noncompliance.

[6]122 Ind. App. 258, 101 N.E.2d 724 (1951).

[7]Act of April 7, 1881, ch. 38, § 593, 1881 Acts (Spec. Sess.) 240, 346 (current version at IND. CODE §§ 34-1-44-1 to 8 (1976)).

[8]122 Ind. App. at 265-66, 101 N.E.2d at 727-28.

[9]10 AM. JUR.2d *Banks* § 339 (1963).

[10]IND. CODE § 26-1-4-402 (1976).

[11]*Id.* § 28-1-20-1(a) provides a bank with protection from liability for damages to any party if it does not honor its agreement with its depositor after it has been notified of an adverse claim to the depositor's bank account.

[12]There have been cases citing other provisions of *id.* § 28-1-20-1. *See, e.g., In re* Estate of Fanning, 263 Ind. 414, 333 N.E.2d 80 (1975).

[13]If the statute applies to proceedings supplemental, the bank will be protected.

the judgment debtor and garnishee defendant. The Note will also analyze Indiana Code section 28-1-20-1(a) to determine if it affords a bank any protection in proceedings supplemental to execution. Finally, this Note will conclude with some suggestions for change in Trial Rule 69(E).

II. Analysis of Law Prior to Trial Rule 69(E)

Prior to the adoption of the Indiana Rules of Trial Procedure, proceedings supplemental to execution were governed exclusively by statute.[14] The statutory remedies provided in proceedings supplemental to execution are the same today as they were immediately prior to the adoption of Trial Rule 69(E) and are divided into three main parts. The first part entitles the judgment creditor to an order by the court requiring the judgment debtor to appear before the court and answer concerning his property, income, or profits.[15] The second part allows the judgment creditor to have proceedings for the application of any property, income, or profits of the judgment debtor toward the satisfaction of the judgment.[16] The third provision allows the judgment creditor to proceed against a third party who is indebted to the judgment debtor or is holding money belonging to him.[17]

Under these sections of the Indiana proceedings supplemental to execution statute, the judgment creditor must establish that execution was issued or returned unsatisfied. Indiana Code section 34-1-44-1 provides in part:

> When an execution against the property of the judgment debtor or any of several debtors in the same judgment, issued to an officer authorized to serve the same . . . , is returned unsatisfied, in whole or in part, the judgment creditor, after such return is made, shall be entitled to an order, . . . requiring the judgment debtor to appear . . . .[18]

In construing the predecessor to the present statute on proceedings supplemental the Indiana Supreme Court in *West v. State ex rel. Benedict*[19] stated: "Before a party may proceed under § 827 . . . he must have a judgment, an execution against the property of the

---

[14]Act of April 7, 1881, ch. 38, § 593, 1881 Acts (Spec. Sess.) 240, 346 (current version at Ind. Code §§ 34-1-44-1 to 8 (1976)). *See generally* Levin, *An Outline of Proceedings Supplementary*, 14 Ind. L.J. 353 (1939).

[15]Ind. Code § 34-1-44-1 (1976).

[16]*Id.* § 34-1-44-2.

[17]*Id.* § 34-1-44-5.

[18]*Id.* § 34-1-44-1.

[19]168 Ind. 77, 79 N.E. 361 (1907).

defendant issued to the sheriff of the county, and a return of such execution by the sheriff unsatisfied."[20]

Under the second part of the statute which provides for the application of the judgment debtor's property to satisfy the judgment, only issuance of an execution, and not a return unsatisfied, is apparently necessary:

> If, after the issuing of an execution against property, the execution plaintiff, or other person in his behalf, shall make and file an affidavit with the clerk of any court of record of any city, county or township to the effect that any judgment debtor, . . . has property or income or profits, . . . which he unjustly refuses to apply . . ., the court, . . . shall issue a subpoena requiring the judgment debtor to appear . . . .[21]

Under Trial Rule 69(E), however, execution is not a necessary condition precedent. "The old formal requirements that the plaintiff prove that execution was issued or returned unsatisfied are eliminated."[22]

Another significant change in proceedings supplemental to execution made by Trial Rule 69(E) is the retention of venue or jurisdiction over proceedings supplemental to execution by the court initially rendering the judgment.[23] This is contrary to prior law.[24] As a result of the simplification of the Rule, proceedings supplemental, with rare exceptions, must be filed in the court where the judgment was rendered.[25] The change is significant in that it allows the motion to be filed with the court. And, if the motion meets the requirements the court will, ex parte and without further notice, order the judgment debtor and any other named parties to appear in court for a hearing or to answer interrogatories.[26]

Prior to Trial Rule 69(E) proceedings supplemental were filed as new causes of action.[27] In reference to the Rule, Professors Harvey and Townsend comment: "Its basic tenet is that proceedings supplemental to execution is a continuation of the original cause . . . ."[28] The Indiana Court of Appeals in *Myers v. Hoover*[29] agreed with Harvey and Townsend: "Given the terms of Trial Rule 69(E) and the

---

[20]*Id.* at 81, 79 N.E. at 363.
[21]IND. CODE § 34-1-44-2 (1976).
[22]4 W. HARVEY & R. TOWNSEND, INDIANA PRACTICE 441 (1970).
[23]Protective Ins. Co. v. Steuber, 370 N.E.2d 406 (Ind. Ct. App. 1977).
[24]Pouder v. Tate, 111 Ind. 148, 12 N.E. 291 (1887).
[25]4 W. HARVEY & R. TOWNSEND, *supra* note 22, at 470.
[26]IND. R. TR. P. 69(E)(4).
[27]Myers v. Hoover, 157 Ind. App. 310, 300 N.E.2d 110 (1973).
[28]4 W. HARVEY & R. TOWNSEND, *supra* note 22, at 469-70.
[29]157 Ind. App. 310, 300 N.E.2d 110 (1973).

procedure thereunder, we are compelled to the conclusion that in adopting the new rule, our Supreme Court intended that proceedings supplemental to execution no longer be considered new and independent civil actions."[30] Since proceedings supplemental are designated as a continuance of the original cause of action, service on the judgment debtor may be made in a similar fashion as service of any other motions or orders in the cause.[31] This means that service on the judgment debtor need not be made by a summons or subpoena.[32]

Even though there are three distinct parts to the proceedings supplemental statute, it has been held that the third provision relating to proceedings against the garnishee must be used in connection with the second provision compelling the debtor to apply property to the judgment.[33] Therefore, both the judgment debtor and the garnishee are necessary parties to the action[34] since the court cannot adjudicate the rights of others in property unless they are made parties.[35] In this situation the procedure is governed by the third provision of the statute.[36]

One must keep in mind that the statutory remedy of proceedings supplemental is substantially an equitable one.[37] The policy in Trial Rule 69(E) is that the judgment debtor has a duty to come forward and pay the judgment.[38] If the judgment debtor does not make property available to satisfy the judgment or arrange for its payment, the judgment creditor's remedy by way of execution is inadequate.[39]

III. NOTICE TO JUDGMENT DEFENDANT

Under the proceedings supplemental statute prior to Trial Rule 69(E) the judgment debtor was a necessary party.[40] Under Trial Rule 69(E) it is not clear whether a hearing is necessary before the court

---

[30]*Id.* at 314, 300 N.E.2d at 113.

[31]Service on parties may be made as provided in IND. R. TR. P. 5. Under Trial Rule 5, if the party is represented by an attorney of record, service shall be made upon the attorney.

[32]IND. R. TR. P. 5(b). *Contra*, IND. CODE § 34-1-44-2 (1976) which *does* require a summons or subpoena.

[33]Mitchell v. Bray, 106 Ind. 265, 6 N.E. 617 (1886).

[34]Earl v. Skiles, 93 Ind. 178 (1883); Mims v. Commercial Credit Corp., 297 N.E.2d 892 (Ind. Ct. App. 1973), *aff'd*, 261 Ind. 591, 307 N.E.2d 867 (1974).

[35]Eilts v. Moore, 117 Ind. App. 27, 30-31, 68 N.E.2d 795, 796 (1946).

[36]IND. CODE § 34-1-44-5. *See* Eilts v. Moore, 117 Ind. App. 27, 68 N.E.2d 795 (1946).

[37]2 R. TOWNSEND, SECURITIES AND CREDITOR'S RIGHTS 490 (1950).

[38]4 W. HARVEY & R. TOWNSEND, *supra* note 22, at 470.

[39]2 R. TOWNSEND, *supra* note 37, at 479.

[40]Mitchell v. Bray, 106 Ind. 265, 6 N.E. 617 (1886); Earl v. Skiles, 93 Ind. 178 (1884).

may issue a final order in garnishment. Part of the Rule states: "If the court determines that the motion meets the foregoing requirements it shall, ex parte and without notice, order the judgment debtor, other named parties defendant and the garnishee to appear for a hearing thereon or to answer the interrogatories attached to the motion, or both."[41] The language appears to allow the court discretion to hold a hearing on the motion and to allow the judgment debtor to have his day in court.

The Fifth Circuit Court of Appeals held in *Brown v. Liberty Loan Corp.*[42] that due process of law[43] did not require notice and an opportunity for a hearing before authorizing a post-judgment garnishment of an individual's wages.[44] The case dealt with a Florida statute providing for a garnishment of wages prior to notice.[45] In reversing the district court, the Fifth Circuit said that competing governmental and individual interests must be closely analyzed to see what due process requires.[46] While the district court found that garnishment was a disfavored governmental function, the Fifth Circuit criticized the district court because it compared prejudgment garnishment cases[47] with the case at hand. The court pointed out that the state has an interest in facilitating the enforcement of judgments. The court said that the judgment creditor is distinguishable from a prejudgment creditor because a judgment creditor has a "judicially-awarded judgment that evidences the defendant's debt."[48] Thus, a judgment creditor's interest is not the freezing of debtor

---

[41]IND. R. TR. P. 69(E).

[42]539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977).

[43]The court discussed due process of law and the property interest at stake when a statutory procedure deprives a person of entitlements under the law. *Id.* at 1362-69. In this case the entitlement was a wage exemption.

[44]539 F.2d at 1368.

[45]FLA. STAT. §§ 77.01, 77.03 (Supp. 1977-78) provide in part:

77.01 Right to garnishment

Every person who has sued to recover a debt or has recovered judgment in any court against any person, natural or corporate, has a right to writ of garnishment, in the manner hereinafter provided, to subject any debt due to defendant by a third person, and any tangible or intangible personal property of defendant in the possession or control of a third person.

77.03 Writ; procurement after judgment

After judgment has been obtained against defendant but before the writ of garnishment is issued, the plaintiff, his agent or attorney, shall file a motion . . . stating the amount of the judgment and that movant does not believe that defendant has in his possession visible property on which a levy can be made sufficient to satisfy the judgment.

[46]539 F.2d at 1363.

[47]*Id.* at 1355, 1365-66. The district court found that Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), controlled.

[48]539 F.2d at 1366.

assets pending adjudication of an alleged debt, but an enforcement of a judgment against those assets. While the judgment debtor had an interest in the use of his wages, he also had an opportunity for a hearing on his exemption after the garnishment. Therefore, the court held that the Florida statute satisfied due process of law.[49]

Even if construed to mean that a hearing was not necessary prior to garnishment, Trial Rule 69(E) is still not clear as to whether notice to the judgment debtor is required. The leading Indiana case interpreting Trial Rule 69(E) and its notice to the judgment debtor provision is *Citizen's National Bank v. Harvey*.[50] The Indiana Court of Appeals' opinion, described by one legal commentator as "accompanied by a sad lack of judicial enthusiasm,"[51] concluded that failure by the trial court to follow procedural requirements under Trial Rule 69(E) did not render the final order in garnishment void as a violation of due process of law.[52] In *Harvey* the defendants had been served with a summons on the original complaint by copies left at their last known address and by mail. Default judgment was entered against them on October 5, 1971, and one week later the judgment creditor returned to court with a Petition in Garnishment. The trial court granted the petition on the same day and the garnishment was in effect until March 1973, when the defendant filed a motion to set aside the garnishment.[53] The trial court granted the motion and set aside the garnishment order as void;[54] the court of appeals reversed and remanded the case to the trial court on the question of laches as well as the reasonableness of time as limited in Trial Rule 60(B).[55] While the court of appeals did not void the orders for lack of jurisdiction over the defendants in the proceedings supplemental nor because they violated the defendants' due process rights, the court stated: "It is undisputed that Citizens' petition failed to comply with Trial Rule 69(E)(3) and (4) in that it did not provide for an order to appear to issue to the Harveys, or an order to appear or to answer interrogatories addressed to the Harveys' employers."[56] This state-

---

[49]*Id.* at 1369.

[50]339 N.E.2d 604 (Ind. Ct. App. 1976).

[51]Townsend, *Secured Transactions and Creditors' Rights, 1976 Survey of Recent Developments in Indiana Law*, 10 IND. L. REV. 310, 333 (1976).

[52]339 N.E.2d at 608.

[53]*Id.* at 606. In Pisarski v. Glowiszyn, 220 Ind. 128, 133, 41 N.E.2d 358, 360 (1942), the court held that in proceedings supplementary to execution, an order requiring payment of money to satisfy a prior judgment was itself a judgment. *But cf.* Protective Ins. Co. v. Steuber, 370 N.E.2d 406, 412 (Ind. Ct. App. 1977) (order against the garnishee defendant held to be an interlocutory order appealable without a motion to correct errors).

[54]339 N.E.2d at 607.

[55]*Id.* at 611.

[56]*Id.* at 606.

ment by the court would seem to indicate that an order to appear at a hearing is necessary before garnishment can be ordered. Alternatively, the decision realistically informs judgment creditors that they can file a motion for proceedings supplemental with the court and proceed to garnishment without a hearing. This procedure would be valid until the garnished debtor decided to take action.

In *Ettinger v. Robbins*,[57] decided before the adoption of Trial Rule 69(E), the Indiana Supreme Court interpreted the present statute[58] pertaining to the judgment creditor proceeding against a third party. The court stated that Indiana Code section 34-1-44-5 did not provide for notice to the judgment defendant, but, because proceedings supplemental to execution was an independent civil action, the general rules of civil procedure applied "even to supply an obvious omission with respect to notice in the statute under which it was brought."[59]

The Indiana Supreme Court could have cited authority that section 34-1-44-2 must be used in connection with section 34-1-44-5, thus requiring notice by subpoena to the judgment debtor.[60] In *Ettinger* the judgment debtor was served with a summons by the sheriff who left a copy at the judgment debtor's usual or last place of residence.[61] The court held that such service complied with the statute.[62]

While in proceedings supplemental to execution under Indiana Code sections 34-1-44-1 to 8 notice is served on the judgment debtor by subpoena[63] or summons,[64] under Trial Rule 69(E) service is made upon the judgment debtor as provided in Trial Rule 5. Trial Rule 69(E)(4) provides in part: "The motion, along with the court's order stating the time for the appearance and hearing *or* the time for the answer to interrogatories submitted with the motion, shall be served on the judgment debtor as provided in Rule 5 . . . ."[65] It should be noted that Trial Rule 5(A)(6) states: "No service need be

---

[57]223 Ind. 168, 59 N.E.2d 118 (1945).

[58]IND. CODE § 34-1-44-5 (1976).

[59]223 Ind. at 174, 59 N.E.2d at 120.

[60]Mitchell v. Bray, 106 Ind. 265, 6 N.E. 617 (1886).

[61]*See* IND. R. TR. P. 4.1. Trial Rule 4.1 allows the sheriff to leave a copy at the residence and then to mail a copy to the last known address.

[62]223 Ind. at 175, 59 N.E.2d at 121.

[63]IND. CODE § 34-1-44-2 (1976).

[64]Ettinger v. Robbins, 223 Ind. 168, 174-75, 59 N.E.2d 118, 120-21 (1945).

[65]IND. R. TR. P. 69(E)(4) (emphasis added). IND. R. TR. P. 5 states in part:

> (B) Service: How made. Whenever a party is represented by an attorney of record, service shall be made upon such attorney unless service upon the party himself is ordered by the court. Service upon the attorney or party shall be made by delivering or mailing a copy of the papers to him at his last known address.

made on parties in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4."[66] This language could mean two things: (1) No service is needed for parties in default, or (2) if the pleading is asserting a new claim or an additional claim, a party in default must be served pursuant to Trial Rule 4. The result of combining literal language of Trial Rule 69(E)(4) and Trial Rule 5 is that an order to appear or an order to answer interrogatories along with a motion for proceedings supplemental must be served on a judgment debtor if he is not in default for failure to appear. If the judgment debtor is in default for failure to appear, no service is necessary unless a new or an additional claim for relief is pleaded.

The crucial issue is whether a motion for proceedings supplemental is a new or an additional claim for relief. Harvey and Townsend state that the relief sought in proceedings supplemental to execution is a new or an additional claim.[67] Thus, the defendant in default must be served by a summons as required in Rule 4.[68] In the only case discussing this issue, the Second District Court of Appeals disagreed with their position. The court in *Harvey* did not say that a judgment debtor in default would not have to be served with process; in fact, the court indicated that notice of some kind must be given to a judgment debtor.[69] Even if due process does not always require notice and a hearing prior to a garnishment,[70] it would seem only fair and equitable to insist on notice and an opportunity for a hearing in light of today's massive consumer credit transactions and the high number of default judgments.[71]

Should proceedings supplemental be considered a new or an additional[72] claim for relief? An examination of the origin of proceedings supplemental shows that, because the remedy is an equitable one, it is available only where other legal remedies are insufficient.[73] Before Trial Rule 69(E), proceedings supplemental to execution were considered extraordinary remedies.[74] It appears that proceedings

---

[66]IND. R. TR. P. 5(A)(6).

[67]4 W. HARVEY & R. TOWNSEND, *supra* note 22, at 473.

[68]*Id.* at 472.

[69]339 N.E.2d at 609; Townsend, *supra* note 51, at 333.

[70]*See* North Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975).

[71]For a discussion of default judgments in consumer transactions, *see* Alderman, *Default Judgments and Postjudgment Remedies Meet the Constitution: Effectuating Sniadach and its Progeny*, 65 GEO. L.J. 1 (1976).

[72]This is one interpretation that might come within the meaning of Ind. R. Tr. P. 5(A)(6).

[73]2 R. TOWNSEND, *supra* note 37, at 479.

[74]Baker v. State *ex rel.* Mills, 109 Ind. 47, 9 N.E. 711 (1887).

supplemental are now considered just a continuation of the original cause as shown in the Civil Code Study Commission comment that Trial Rule 69(E) assumes the judgment debtor is under a duty to make assets available or to pay the judgment creditor.[75] The requirement of a second summons specifically for judgment defendants in default seems to go against the spirit of Trial Rule 69(E).[76]

One approach is utilized by the Indianapolis Bar Association which provides a form entitled "Order to Appear in Court."[77] Most Indianapolis attorneys use this form or have one modeled after it. This order is served as a matter of practice on the judgment debtor in proceedings supplemental. The form states generally that the plaintiff judgment creditor has shown the court by a verified motion that he owns a judgment against the defendant, the date the judgment was obtained and its amount, and that the defendant is ordered to appear personally in court on a certain date to answer as to wages, assets and other property. The form also gives the name and address of the plaintiff's attorney.[78] The manner of service is the same as a summons under Trial Rule 4. The usual practice is to have the sheriff serve the order. Thus, even though under Trial Rule 69(E) service may be made under Trial Rule 5, it is usually served in the same manner as a summons. The difference is that the order to appear is signed by the judge of the court and is not a summons issued through the clerk's office. Discussion at this point might seem purely academic except that problems emerge from practice which the rules do not anticipate. If the sheriff cannot locate the defendant, he returns the order unserved. At the same time, the judgment creditor may have served interrogatories on the judgment debtor's employer pursuant to Trial Rule 69(E), and the interrogatories may have been returned showing that the judgment debtor makes a substantial salary. Under these facts, whether the judgment creditor is entitled to a garnishment order is uncertain. If Trial Rule 5 applies and service is required, it may be made by mailing a copy to the last known address.[79] Choice of service would dictate conflicting results. If Trial Rule 5 applies, the judgment creditor need only mail the order to last known address to be able to garnish the wages of the judgment debtor. If Trial Rule 4 applies, the order must be served in the same manner as an original summons. All the methods of service under Trial Rule 4.1 could be used. The practice in Marion

---

[75]4 W. HARVEY & R. TOWNSEND, *supra* note 22, at 441.

[76]The first summons is issued to a defendant when the law suit is initiated pursuant to Trial Rule 4.

[77]Indianapolis Bar Association Form 18.

[78]*Id.*

[79]IND. R. TR. P. 5(B).

County today is a mixture of Trial Rule 4 and Trial Rule 5. Under Trial Rule 4, if a copy is left at the usual place of abode, it must be followed by a mailing.[80] There is no such provision in Trial Rule 5.

Given the judgment debtor's duty to come forward with assets to pay the judgment as presumed by Trial Rule 69(E), and given the alternate methods of service as provided, the purpose of the Order to Appear becomes important. The judgment creditor may know the judgment debtor's place of employment. Therefore, a major concern is to give the employer notice, to receive the employer's answers to the interrogatories, and to bring them into court in order to proceed with the garnishment. In this situation it is not important to the creditor that the judgment debtor receive *actual* notice of the garnishment.

On the other hand, the judgment creditor may not know whether the judgment debtor has any assets or is employed. To realize any remedy, he must examine the judgment debtor as to assets or employment. Therefore, to this judgment creditor, *actual* notice to the judgment debtor is important. The court, however, must follow the correct procedure as set out by Trial Rule 69(E). In order to do so, the Rule should be clarified so the policy of satisfying judgments can be carried out in a manner constitutionally permissible.

The problem of notice to the judgment debtor is always important, but then it becomes more acute when notice to the garnishee defendant is also involved. The garnishee defendant, whether an employer, a bank or any third person, is usually brought into proceedings supplemental because it allegedly holds money for the judgment defendant or owes money to him. Consumer transactions have grown rapidly in the United States,[81] and the rapid pace and flow of business have caused cash transactions to give way to credit and checks, causing garnishment of bank accounts to become an important area in Indiana law.

IV. Notice to the Garnishee Defendant

Indiana Code section 34-1-44-5 provides for compulsory filing of an affidavit alleging that a third party has property of the judgment debtor which exceeds the exempt amount.[82] The affidavit is filed by

[80]This Note will not go into the details of service of process under Trial Rule 4. Other issues may be raised under Trial Rule 4, such as whether failure to serve the judgment debtor causes a subsequent garnishment to be void or voidable. *See* Citizen's Nat'l Bank v. Harvey, 339 N.E.2d 604 (Ind. Ct. App. 1976).

[81]*See* Note, *Changing Concepts of Consumer Due Process in the Supreme Court—The New Conservative Majority Bids Farewell to Fuentes*, 60 Iowa L. Rev. 262 (1974).

[82]Ind. Code § 34-1-44-5 (1976) provides in part:

> Third parties; when required to appear—After the issuing or return of an execution against the property of the judgment debtor or any one of the

the judgment creditor after issuance or return of execution.[83] The third-party garnishee defendant can be ordered to appear if the judge so orders. Otherwise, the court may order interrogatories answered and returned to the court. Property in the hands of a third person which belongs to the judgment debtor—including money on deposit in a bank—may be garnished.[84]

The case in Indiana which has had the greatest impact on proceedings supplemental to execution is *Union Bank and Trust Co. v. Vandervoort.*[85] Analysis of the facts of this case is critical to the resolution of the issues of law in this area. The plaintiff, Vandervoort, recovered a judgment against the defendant judgment debtor. Execution was issued pursuant to statute in the county where the defendant resided but remained unsatisfied in the hands of the sheriff. The judgment debtor had held a savings account in the garnishee defendant bank that had contained enough money to satisfy the judgment. The judge of the trial court ordered the bank and judgment debtor to appear before the court in a hearing to answer as to any property available for satisfaction of the judgment. The order of the court, along with a summons, was served on both judgment debtor and the bank on August 6, 1948. On August 7, 1948, the bank honored its depositor's demand to withdraw his money. The judgment debtor then gave the money to his son who lived in Ohio —outside the court's jurisdiction. At the hearing on proceedings supplemental to execution, on August 13, 1948, the judgment creditor discovered that there was no money in the savings account. The trial court ordered the garnishee defendant bank to satisfy the execution. The bank, in effect, paid twice.

The bank appealed and the court of appeals affirmed the judgment of the trial court.[86] The appellate court reasoned that, by commencing the proceedings supplemental and serving the bank with process, the judgment creditor "acquired an equitable lien on the

---

several debtors in the same judgment, and upon an affidavit that any person, corporation, municipal or otherwise, the state or any subdivision or agency thereof has property of such judgment debtor, or is or will be from time to time indebted to him in any amount, although the amount shall be determined from time to time as it becomes due and payable, which, together with other property claimed by him as exempt from execution, shall exceed the amount of property so exempt by law, such person, corporation, or any member thereof, or the auditor of state or auditing officer of the municipal corporations, subdivisions or agencies of the state, may be required to appear and answer concerning the same . . . .

[83]*Id.*

[84]D.L. Adams Co. v. Federal Glass Co., 180 Ind. 576, 103 N.E. 414 (1913).

[85]122 Ind. App. 258, 101 N.E.2d 724 (1951).

[86]*Id.* at 266, 101 N.E.2d at 728.

credit and funds due the defendant."[87] In support of its position, the majority cited two cases[88] that require analysis.

Cooke v. Ross[89] held that the judgment creditor has a lien on the property and the judgment debtor has no right to assign the money to other creditors after service of process is issued upon the judgment debtor and garnishee defendant. The court further said that the judgment debtor could not raise a question involving the liability of the garnishee defendant.[90] It should be emphasized that both parties were served with a summons. The case does not mention the liability of a garnishee defendant bank that honors a depositor's demand for withdrawal.

The *Cooke* opinion cited *Graydon v. Barlow*[91] for the principle that a lien is on the property from the time of service of process on the judgment debtor and garnishee defendant. The opinion said nothing about the liability of a garnishee defendant to a judgment creditor. *Cooke* and *Graydon* dealt with the judgment debtor and not the garnishee defendant. In *Graydon* the court noted:

> In *Butler v. Jaffray*, 12 Ind. 504, it is, in effect, decided, that a creditor instituting proceedings under this statute, thereby acquires a lien on the fund intended to be reached. It is not there expressly decided at what precise stage of the proceedings such lien will attach, but merely that such proceedings do create a lien; and that the recovery of a judgment, and taking out execution thereon, does not create a lien upon a fund similar to that here attempted to be made subject to the payment of this debt.
>
> Without deciding at what point of the proceedings a lien will attach, we are of the opinion that it had so far progressed in the case at bar as to create a lien, which the defendants could not divest by making an assignment.[92]

The judgment debtor in *Graydon* had made an assignment to other creditors while proceedings supplemental were pending. The court held that the defendants could not divest the lien by assignment for the benefit of their creditors.[93]

The statute under which *Vandervoort* was decided states *inter alia* that interrogatories may be ordered answered as to property

---

[87]*Id.* at 265, 101 N.E.2d at 727.

[88]*Id.*, (citing Cooke v. Ross, 22 Ind. 157 (1864); Graydon v. Barlow, 15 Ind. 197 (1860)).

[89]22 Ind. 157 (1864).

[90]*Id.* at 159.

[91]15 Ind. 197 (1860).

[92]*Id.* at 197-98.

[93]*Id.* at 198.

held for the judgment debtor by the third party or garnishee defendant, that the court shall issue a subpoena requiring the judgment debtor to appear before the court, and "such proceedings may, *thereafter*, be had for the application of the property, or income or profits of the judgment debtors toward the satisfaction of the judgment . . . ."[94] In a dissenting opinion, Judge Bowen pointed out that the judgment creditor could have obtained a restraining order or an injunction to prevent the bank from paying any money until resolution of the proceedings supplemental.[95] This may be true in many cases; however, there are courts which handle a large volume of proceedings supplemental to execution which have limited equitable jurisdiction to issue restraining orders or injunctions.[96] In any event, a bank and its depositor assume the relationship of debtor-creditor[97] and the bank has a duty to honor this relationship.[98]

After *Vandervoort*, the wrongful dishonor statute[99] becomes important. If a bank is served with process, it will become liable to the judgment creditor if funds are paid to its depositor, the judgment debtor. When a check is presented for payment, the bank is placed in an unenviable position. *Vandervoort* implies that the bank must freeze the account and, thus, could possibly be liable to its depositor. Only the dissent in *Vandervoort* recognized this problem:

> It would seem to be elementary justice that the bank in the instant case should not be held liable to the creditor of the defendant debtor until some order or decree is served upon such bank, restraining it from paying the amount of a deposit to one of its depositors, in view of the well established principle of banking law that the obligation of a bank to its depositor is to repay the depositor on a proper demand.[100]

---

[94]Act of April 7, 1881, ch. 38, § 593, 1881 Acts (Spec. Sess.) 240, 346 (current version at IND. CODE §§ 34-1-44-1 to 8 (1976)) (emphasis added).

[95]122 Ind. App. at 268, 101 N.E.2d at 728 (Bowen, J., dissenting). The result in *Vandervoort* has the identical effect which an injunction would have.

[96]The Marion County Municipal Court has limited equitable jurisdiction. *See* IND. CODE § 33-6-1-2 (1976). *See also* IND. R. TR. P. 65(B) and its 10-day limitation.

[97]Storen v. Sexton, 209 Ind. 589, 200 N.E. 251 (1936).

[98]IND. CODE § 26-1-4-402 (1976) provides:

> Bank's liability to customer for wrongful dishonor.—A payor bank is liable to its customer for damages proximately caused by the wrongful dishonor of an item. When the dishonor occurs through mistake liability is limited to actual damages proved. If so proximately caused and proved damages may include damages for an arrest or prosecution of the customer or other consequential damages. Whether any consequential damages are proximately caused by the wrongful dishonor is a question of fact to be determined in each case.

[99]*Id.*

[100]122 Ind. App. at 270, 101 N.E.2d at 729 (Bowen, J., dissenting). *Vandervoort* has not been cited as authority by any Indiana court.

Another important facet of acquiring the garnishee defendant's property is the problem of notice. Trial Rule 69(E)(4) provides that the garnishee is entitled to service as provided in Rule 4.[101] Thus, even though proceedings supplemental are considered a continuation of the original cause, garnishee defendants who have not been made parties to the action are to be served by summons. It is necessary under Rule 69(E)(4) to send a copy of the motion of proceedings supplemental with the interrogatories if the judgment creditor is trying to discover any assets in the hands of the garnishee. In addition, Rule 69(E)(4) provides that the judgment creditor may "utilize the discovery provision of these rules in the manner provided in these rules for discovery or as provided under the laws allowing proceedings supplemental."[102] In other words, interrogatories may be sent to employers and banks to locate assets and possible employment of the judgment debtor. If interrogatories are sent to a bank that has an account listed in the judgment debtor's name, should this be considered a lien on the bank account as a matter of policy? Until a recent revision in August, 1977, the Indianapolis Bar Association provided a form for attorneys entitled "Order to Answer Interrogatories, Notice of Hearing, and Interrogatories."[103] This form was sent to employers and stated generally that the plaintiff as judgment creditor submitted interrogatories and that the court ordered the garnishee defendant to answer the interrogatories and return them to court. The form notified the garnishee defendant of a hearing on the matter and stated that the garnishee defendant may attend the hearing. The form was served on the garnishee defendant in the same manner the order to appear[104] is served on the judgment debtor, that is, like a summons.

In August, 1977, Form 19 was changed to conform with the Rules of Practice and Procedure of the Civil Divisions of the Municipal Court of Marion County, Indiana.[105] Rule 26(B) says in part:

> As a minimum, the order to answer interrogatories will contain the following information: that the plaintiff has a judgment against the defendant and the amount of the judgment; that the garnishee defendant may answer the interrogatories in writing on or before _____, or appear in court and answer the interrogatories in person, at his option; the time, date and place of the hearing; that any claim or defense to a proceedings supplemental or garnishment order must be

---

[101]IND. R. TR. P. 69(E)(4).

[102]*Id.*

[103]Indianapolis Bar Association Form 19 (rev. March, 1975).

[104]Form 18, *supra* note 77.

[105]These Rules became effective in August, 1976

> presented at the time and place of the hearing specified in the order to appear.[106]

This is now incorporated into Form 19 and the Rule is also applicable to interrogatories sent to banks.[107] Nevertheless, the language may not be sufficient to satisfy due process.

In *Vail v. Quinlan*[108] a portion of a New York statute[109] was held unconstitutional because a notice for an order to show cause why a judgment defendant should not be held in contempt did not tell the judgment defendant what would happen if he failed to obey. The court held that notice appropriate to the nature of the case is concomitant to a fair hearing.[110] The court further stated:

> [N]otice must be complete and clear, given the substantial deprivation of liberty that may result from failure to respond. Fundamental fairness requires that the show cause order contain a clear statement of the purpose of the hearing and a stark warning that failure to appear may result in contempt of court and imprisonment.[111]

Vail was reversed by the Supreme Court on grounds of comity and federalism.[112] The issue of notice, however, is still open.

Pursuant to *Vandervoort*, even if a bank complied fully with an order to answer interrogatories and then honored its depositor's checks, it would still be liable to the judgment creditor for the amount that was previously in the bank account but is no longer available. While a bank's mandatory double payment, may not be so harsh a result as to contravene the due process clause of the fourteenth amendment, according to *Vail* fundamental fairness should require clear notice. Harvey and Townsend suggest the notice to the garnishee defendant state that the order by the court may constitute a lien in favor of the plaintiff-judgment creditor upon any property held by the garnishee for the judgment debtor.[113] They

---

[106]MARION COUNTY MUN. CT. CIV. DIV. R. 26.

[107]*See* Indianapolis Bar Association Forms 19 (rev. March, 1975 & Aug., 1977).

[108]406 F. Supp. 951 (S.D.N.Y. 1976), *rev'd sub nom.* Juidice v. Vail, 430 U.S. 327 (1977).

[109]N.Y. JUD. LAW § 757(1) (McKinney 1975). In 1977 New York changed its law so that in both sections 756 and 757, the notice is changed to inform the accused that failure to appear may result in his immediate arrest. N.Y. JUD. LAW §§ 756-57 (McKinney Supp. 1977).

[110]406 F. Supp. at 959 (citing Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950)).

[111]406 F. Supp. at 959-60.

[112]Juidice v. Vail, 430 U.S. 327, 338-39 (1977). The Supreme Court found that the judgment debtors had an opportunity to present their federal claims in the state court proceedings. *Id.* at 337.

[113]4 W. HARVEY & R. TOWNSEND, *supra* note 22, at 479.

state: "[A]ny disposition of such assets after receipt of this order and contrary to the ultimate determination of this court as to the existence and amount of such lien will be made at the garnishee's risk."[114]

As yet the trial rules do not require such notice. The bank is still in a predicament as to which choice to make even if it has notice of a *possible* lien. Normally, banks "freeze" accounts, at least up to the amount of judgment, when they receive an order to answer interrogatories. As one would expect, with little precedent to guide them, the practice leaves the banks open to suit.

In *Nelson v. Indiana National Corp.*[115] the plaintiff sued Indiana National Corporation (Indiana National Bank) because it froze his bank account upon receipt of an order to answer interrogatories from the Municipal Court of Marion County. In *Midwest National Bank v. Nelson*[116] a default judgment for $6,695 was entered on July 29, 1975. On September 9, 1975, the plaintiff judgment creditor filed a motion for proceedings supplemental, sending several banks orders to answer interrogatories. In February, 1977, plaintiff, finding no accounts, again filed a motion for proceedings supplemental and orders to answer interrogatories were sent to Indiana National Bank and American Fletcher National Bank. The judgment creditor located a $1,559.07 account at Indiana National Bank as of February 8, 1977. On March 25, 1977, a hearing was held in municipal court and the account was made eligible for garnishment. As a result of the "freeze" put on the account by Indiana National Bank, ten checks drawn by Nelson were allegedly dishonored. The defendant, Indiana National Bank, admitted in an answer to an interrogatory that it had not notified Nelson upon receiving the interrogatories which, by implication, means the bank did not tell him about the freeze.

The bank is, therefore, on the horns of a dilemma—honor the judgment creditor's possible lien and defend lawsuits by disgruntled depositors, or honor the depositor-bank relationship and possibly pay twice. The bank in this position might be afforded the protection of the Indiana Notice of Adverse Claims to Deposit statute.[117]

V. Trial Rule 69(E) and the Adverse Claim Statute

The adverse claim statute provides that notice to any bank of an adverse claim to a deposit standing on its books will not require a

---

[114]*Id.* at 480.

[115]No. C77-812 (Ind., Marion County Cir. Ct., filed April 11, 1977).

[116]M875-1426 (Ind., Marion County Mun. Ct., July 29, 1975).

[117]Ind. Code § 28-1-20-1(a) (1976).

bank to recognize a claim unless the adverse claimants follow the statute.[118] If proceedings supplemental to execution come under this statute, the bank will be protected and the judgment creditor will also have his interests protected.

The purpose of such an adverse claim statute is to define the procedure to be followed by an adverse claimant. This procedure affords the depositor and the bank reasonable protection and corrects the situation where a bank "may be vulnerable to the imposition of liability for freezing a deposit upon notice of an adverse claim which is not subsequently sustained."[119]

The first qualification for application of the statute is that the claim must be shown to be adverse.[120] In *St. Lukes Hospital v. Godet*,[121] the court discussed policy reasons behind New York proceedings supplemental statutes. The case dealt with an application by a judgment creditor to punish a bank for contempt because it disobeyed injunctive provisions of a subpoena served on it in supplementary proceedings. At the time of service there was money in an account but the bank later paid the money to the wife of the judgment debtor.[122]

The New York law dealt with service of a subpoena on the judgment debtor or any third party. After being served with the subpoena, the judgment debtor or third party was forbidden to transfer or dispose of any moneys until further order of the court. The law, as amended the previous year, contained an additional provision which said that the prohibition of transfer would not apply to a case where by state law the effectiveness of any notice of adverse claim to any property required certain conditions to be followed, unless the judgment creditor complied with the adverse claim provisions.[123]

The reason for the addition is that under New York law, for a judgment creditor to qualify as an *adverse* claimant, the money sought to be reached in a bank account must be in the name of someone *other* than the judgment debtor.[124] In practice, judgment creditors will try to enjoin payment of funds from a bank account in the name of someone other than the judgment debtor, ostensibly because the other person is holding the judgment debtor's money. In

---

[118]*Id.*

[119]There are no Indiana cases on point which construe this statute so recourse must be taken to other states and their adverse claim statutes. *See* 62 A.L.R.2d 1116, 1117 (1958).

[120]*Id.* at 1118.

[121]171 Misc. 7, 11 N.Y.S.2d 900 (Cit. Ct. N.Y. Spec. Term 1939).

[122]*Id.* at 8, 11 N.Y.S.2d at 902. The account was held jointly by the husband and wife.

[123]*Id.* at 13, 11 N.Y.S.2d at 904-05.

[124]*See* 62 A.L.R.2d 1116, 1122 (1958).

such a limited number of cases, the Committee on Law Reform of the New York City Bar felt the additional provision would clarify the law.[125] If *Vandervoort* had been decided in New York, the judgment creditor would not have been considered an adverse claimant and, thus, the bank would not have had protection of the statute. Under New York law, however, the judgment creditor's attorney can issue a subpoena to a bank and forbid transfer of any funds.[126] Thus, banks are bound by statute.

In another New York case, *Barber v. Maritime Suisse S.A.*,[127] the court found the adverse claim statute was not applicable where the judgment creditor sought only an examination of the bank and not an actual claim upon the bank. The New York statute was further construed in *Ginsberg v. Manufacturers' Hanover Trust Co.*[128] There the court completely rejected the idea that a summons alone was ever intended to have the effect of a restraining order and be "other appropriate process"[129] within the meaning of the statute.

Another view of adverse claimants was taken by a Missouri court in *Baden Bank of St. Louis v. Trapp.*[130] The court stated that an adverse claimant is "one who claims that a deposit belongs to him instead of to the one to whose credit it stands on the books of the bank."[131] The claimant was not adverse because she claimed that the money in the account belonged to her divorced husband against whom she had a judgment and did not belong to those in whose name the account was held. The court stated that, if the claimant's former husband had claimed the money as his own, he would have been an adverse claimant.[132] The purpose of the Missouri statute, the court said, was to give a bank immediate and complete protection when a claim regarding the *true ownership* of the money is involved.[133] Thus, proceedings supplemental to execution seemingly would not be an adverse claim and the bank would be afforded no protection by the statute.

In *Staley v. Brown*[134] the Mississippi Supreme Court construed that state's adverse claim statute as applicable to a judgment cred-

---

[125]171 Misc. at 13, 11 N.Y.S.2d at 904.

[126]N.Y. CIV. PRAC. LAW § 5222 (McKinney 1978). *Godet* involved Act of April 9, 1938, ch. 605, § 4, 1938 N.Y. Laws 1603 (current version at N.Y. CIV. PROC. LAW § 5222 (McKinney 1978)).

[127]70 N.Y.S. 540 (Sup. Ct. Spec. Term 1947).

[128]55 Misc. 2d 1052, 287 N.Y.S.2d 818 (Sup. Ct. Spec. Term 1968).

[129]*Id.* at 1054, 287 N.Y.S.2d at 821.

[130]180 S.W.2d 755 (Mo. Ct. App. 1944).

[131]*Id.* at 759.

[132]*Id.*

[133]*Id.*

[134]244 Miss. 825, 146 So. 2d 739 (1962).

itor seeking to garnish funds of a judgment debtor in his wife's bank account.[135] The court stated that, in the absence of notice to the contrary, ownership of a deposit in a bank account is presumed to be in the depositor, and the bank is bound to pay him or her on proper demand.[136] *Staley* shows application of an adverse claim statute to supplemental proceedings only where the ownership of a bank account is in question. If a judgment creditor wants to garnish a bank account in a third person's name containing money actually belonging to the judgment debtor, the judgment creditor must follow the adverse claim statute.[137]

Indiana's adverse claim statute has an additional provision which could be easily applied to proceedings supplemental.[138] This provision states that, if the adverse claimant: (1) Notifies the bank in writing of the adverse claim, (2) tells the bank the nature of the claim, and (3) states that proceedings have been instituted or will be instituted within three days, then the bank "may hold the amount of the deposit in controversy without liability for damages to any party by reason of its failure to treat said amount in accordance with its agreement with the depositor . . . ."[139]

Under Rule 69(E) the judgment creditor sends interrogatories to the bank along with a motion for proceedings supplemental. This complies with Indiana Code section 28-1-20-1(a)(3). The courts in Indiana have not determined whether Indiana Code section 28-1-20-1(a)(3) is applicable to a judgment creditor who sends a motion for proceedings supplemental to a bank along with interrogatories. From the New York decisions on this issue, it would be reasonable to assume that Indiana Code section 28-1-20-1(a)(3) applies. If a judgment creditor who follows the procedure under Trial Rule 69(E) and tries to reach a deposit in the name of someone other than the judgment debtor is afforded the protection by Indiana Code section 28-1-20-1(a)(3), protection should be extended to the bank when the account sought to be reached is in the judgment debtor's name. The result in *Vandervoort* would, thus, be avoided.

The *Vandervoort* result, in practice, causes interrogatories to have the effect of restraining orders. Proceedings supplemental to

---

[135]*Id.* at 829, 146 So. 2d at 740.

[136]*Id.* at 831, 146 So. 2d at 741.

[137]*See* Phil Grossmayer Co. v. Campbell, 214 Or. 265, 328 P.2d 320 (1958). The court stated: "The application of the statute just cited is not restricted to attachment and garnishment proceedings. It does not even mention proceedings of that kind and its reach is broader. The statute is applicable in all cases when an 'adverse claim to a deposit' is made." *Id.* at 276, 328 P.2d at 325.

[138]IND. CODE § 28-1-20-1(a)(3) (1976).

[139]*Id.*

execution, being merely an extension of the original cause under Trial Rule 69(E) and taking on a larger role as discovery, should not be interpreted as allowing interrogatories sent to banks to have such an effect. Due process may or may not require that notice be complete and clear, but present practice under Trial Rule 69(E) needs to be improved.

VI. Conclusion

Since the purpose of Trial Rule 69(E) is to aid the judgment creditor in satisfying his judgment, it is important that all parties have actual notice. The judgment debtor who has any claims or defenses to proceedings supplemental to execution should be able to assert them. Further, a judgment debtor who is employed may be willing to arrange for payment plans in lieu of a salary garnishment.[140]

Trial Rule 69(E) should be changed so that notice to the judgment debtor is an absolute condition to garnishment. An order to appear should be served on the judgment debtor in the same manner as it is now done in Marion County practice. If the judgment debtor is represented by counsel, service should also be made on the counsel.[141]

Trial Rule 69(E) could also be modified by requiring the judgment creditor to serve copies of all pleadings, including interrogatories sent to banks, on the judgment debtor in the same manner as the order to appear. Such notice to the judgment debtor should also tell him that any removal of funds would be viewed as contempt of court.

Additionally, Trial Rule 69(E) should also be changed in relation to garnishee defendants. Municipal Court Rule 26 could be incorporated, thereby informing the garnishee defendant that claims or defenses must be presented at the hearing. Harvey and Townsend suggest that informing garnishee defendants that there may be a lien on the judgment debtor's property would satisfy the notice requirement.[142]

Finally, two alternative changes would affect Trial Rule 69(E) and its relationship with Indiana Code section 28-1-20-1(a). Indiana Code section 28-1-20-1(a) could be amended to apply to a judgment creditor seeking to garnish a bank account in the name of someone other than the judgment defendant. An amendment to Rule 69(E)

---

[140]*See* Civil Code Study Commission Comments in 4 W. Harvey & R. Townsend, *supra* note 22, at 439.

[141]*See* Ind. R. Tr. P. 5.

[142]4 W. Harvey & R. Townsend, *supra* note 22, at 480.

could specify that a summons or subpoena served on a bank or other garnishee defendant forbid the transfer or other disposition of any funds or property until the court hearing.

The last alternative is to amend Indiana Code section 28-1-20-1(a) so that it clearly applies to judgment creditors sending interrogatories to banks pursuant to Trial Rule 69(E).

MICHAEL C. PEEK

Time for Change: Evidentiary Safeguards Needed in Trials for Sexual Offenses

I. INTRODUCTION

Deviate sexual crimes involve explosive legal and moral issues. Due to the highly emotional nature of such crimes an intensive effort should be made throughout the trial to insulate the jury from information which, while of little probative value, would unduly prejudice the jury against a defendant. Unfortunately for many defendants, Indiana courts have refused to provide evidentiary safeguards to limit juror prejudice in prosecutions for deviate sex crimes. Instead, the courts have actively fanned the passions of juries by permitting introduction of evidence showing that the defendant had participated in other deviate sexual activities. Such evidence may lead to a wrongful conviction based upon the jury's reaction to the testimony of the defendant's bad character.

The prejudicial impact of evidence indicating that the accused is a recidivist is widely recognized and is responsible for the fundamental rule prohibiting the introduction of evidence regarding other wholly independent offenses to support the implication that the defendant is guilty of the offense for which he is being tried.[1] Yet, in prosecutions involving deviate sexual offenses, the Indiana courts discard the prohibition against introduction of testimony showing prior offenses.[2] This disregard of fundamental evidentiary safeguards appears extremely unusual in light of the intensely emotional nature of prosecutions for sex crimes which heightens the possibility of juror prejudice. Admitting the evidence of prior sex crimes often inflames the passions and prejudices of a jury, thus making the defendant's conviction more likely. The ultimate accuracy of the jury's verdict is of little consequence to the discussion herein, but, rather, it is the manner in which the conviction is secured that is important. This Note will critically analyze the current Indiana practice whereby convictions for deviate sexual crimes are secured in part by the introduction of evidence indicating that the defendant has committed prior deviate sexual crimes.

Advocates of the current practice of always allowing a jury to consider evidence of prior sex offenses by the defendant find support for their position in a large body of case law. Those holdings state that such evidence should be admitted because of its relevancy, regardless of its accompanying prejudicial impact inherent

---

[1] I B. JONES, JONES ON EVIDENCE § 4:18 (6th ed. S. Gard 1972).

[2] Pieper v. State, 262 Ind. 580, 321 N.E.2d 196 (1975).

within the evidence. This Note will examine those cases and, by tracing their evolution into the current Indiana practice of admitting evidence of deviate sex crimes, show why the practice is inaccurate, misleading and dangerous.

II. Admissibility of Evidence Showing Prior Sexual Crimes by Defendant (An Exception to an Exception)

In order to be admissible, evidence must be relevant[3]—logically tending to prove a material fact.[4] Accordingly, evidence of prior crimes is generally inadmissible in a criminal case, because it serves to mislead the jury rather than to establish guilt or innocence of the accused.[5] Several well-established exceptions exist which permit evidence of prior crimes to be admitted if used for limited purposes.[6] Indiana law will admit evidence of prior crimes if it is relevant to some issue in the case, such as intent, motive, knowledge, plan or identity.[7] However, deviate sexual crimes have been specifically exempted from the general requirement that evidence of prior crimes be excluded unless shown to fall within these exceptions.[8] Thus, the admissibility of evidence showing prior deviate sexual activity is treated as an exception to an exception. The reasons for the evolution of this special treatment will be discussed later. At this point, it is sufficient to note that, as a result of the special status afforded deviate sex crimes, it is *always permissible* for the state, in actions involving abnormal sexual conduct, to introduce evidence of other improper acts of sexual intimacy committed by the defendant.[9]

To justify the automatic admission of highly prejudicial information showing prior sexual offenses the courts have intimated that such evidence is significant, relevant and necessary in aiding the

---

[3]McCormick's Handbook of the Law of Evidence § 184, at 433-34 (2d ed. E. Cleary 1972) [hereinafter cited as McCormick].

[4]Stallings v. State, 250 Ind. 256, 235 N.E.2d 488 (1968).

[5]Lawrence v. State, 259 Ind. 306, 310, 286 N.E.2d 830, 832 (1972). *See also* Whitty v. State, 34 Wis. 2d 278, 292, 149 N.W.2d 557, 563 (1967), in which the Wisconsin Supreme Court stated that the character rule excluding prior crimes evidence as it relates to the guilt issue rests on four bases: (1) The overstrong tendency to believe the defendant guilty of the charge merely because he is a person likely to do such acts; (2) the tendency to condemn not because he is believed guilty of the present charge but because he has escaped punishment from other offenses; (3) the injustice of attacking one who is not prepared to demonstrate the attacking evidence is fabricated, and (4) the confusion of issues which might result from bringing in evidence of other crimes.

[6]McCormick, *supra* note 3, § 190.

[7]Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968).

[8]Lamar v. State, 245 Ind. 104, 107, 195 N.E.2d 98, 101 (1964).

[9]*Id.* at 109, 195 N.E.2d at 101.

jury in reaching a proper verdict.[10] In the process of establishing the broad and prejudicial practice whereby evidence of prior deviate sexual crimes is always deemed admissible, however, the Indiana courts have offered little more than a cursory explanation of why such information aids the jury in reaching a proper verdict. In order to understand the rationale behind the current evidentiary practice which always admits evidence of prior deviate sex crimes, one must clearly understand how the practice evolved.

III. Early Development of Evidentiary Practice Admitting Testimony Showing Prior Deviate Sex Crimes by Defendant

In tracing the growth of the current Indiana practice in which evidence of prior sex crimes is freely introduced by the state, it is readily apparent that the modern practice is too broad and lacks justification. Evidence of prior deviate sexual conduct was first admitted and upheld in Indiana by *State v. Markins*.[11] In sustaining the defendant's conviction for incest, the court assumed as a rule of logic and rudimentary law that it is more probable that incestuous intercourse will take place between persons who have conducted themselves with indecent familiarity.[12] As support for its own justification of why evidence of prior sexual crimes should be relevant in a subsequent prosecution, the court in *Markins* cited six other jurisdictions whose holdings were in accord with that of *Markins*.[13] The principal support for *Markins* was provided by *People v. Jenness*.[14] In *Jenness*, as was true in *Markins*, the defendant had been convicted of incest. The Michigan Supreme Court, in upholding the conviction of *Jenness*, offered several possible rationales as bases for allowing the jury to consider evidence showing prior acts of incest by the defendant. The primary reasons given for allowing the jury to hear evidence regarding prior sexual misconduct by the defendant were that such prior acts showed concert, demonstrated a common design, and illustrated habitual activities between the parties involved.[15]

---

[10]Merry v. State, 335 N.E.2d 249 (Ind. Ct. App. 1975).

[11]95 Ind. 464 (1884). *See also* Lovell v. State, 12 Ind. 18 (1859), in which the court did not allow evidence of a subsequent act, claiming that such evidence was irrelevant and prejudicial, but also noting that incest was outside of the common list of exceptions to the general rule of admissibility. *Lovell* was concerned with the exclusion of evidence while *Markins* dealt with the admission of evidence.

[12]95 Ind. at 465.

[13]*Id.* at 467-68 (citing Lawson v. State, 20 Ala. 65 (1852); Thayer v. Thayer, 101 Mass. 111 (1869); People v. Jenness, 5 Mich. 305 (1858); State v. Pippin, 88 N.C. 646 (1883); State v. Kemp, 87 N.C. 538 (1882); and State v. Bridgman, 49 Vt. 202 (1876)).

[14]5 Mich. 305 (1858).

[15]*Id.* at 322.

Significant problems exist in using the holdings of *Markins* and *Jenness* to support the modern practice in which courts always allow the jury to consider prior sexual misconduct by the defendant. The problems arise in part from the factual situations involved in *Markins* and *Jenness*. Both cases related to situations in which identical parties and crimes were involved. In fact, each court specifically based the relevancy of prior crimes on the fact that the later prosecution involved the same parties and crimes as the prior offenses.[16]

An additional problem arises when the *Jenness* decision is utilized to support the current practice of specifically exempting deviate sex offenses from the general evidentiary rule which prohibits the introduction of testimony showing prior crimes except when intended to prove intent, motive, knowledge, plan or identity. The language in *Jenness* clearly suggests that the decision to allow evidence of prior incestuous conduct was based upon the general exceptions to the rule of evidence rather than the creation of a new exception allowing evidence of prior crimes if the case was for a deviate sexual crime.[17] It is obvious that the Indiana Supreme Court overlooked or misinterpreted, the reasoning of the Michigan court when *Markins* cited *Jenness* for the proposition that: "The general rule undoubtedly is, that one crime cannot be proved in order to establish another independent crime, *but this rule does not apply to cases where the chief element of the offence [sic] consists in illicit intercourse between the sexes.*"[18] The reasoning of the Michigan court in *Jenness* simply does not support the broad proposition stated by *Markins*. Unfortunately, the language of *Markins* has been repeated numerous times until, eventually, sexual crimes now constitute a special exception to the evidentiary rule precluding information showing prior sex offenses by the defendant. Thus, the current practice whereby evidence of prior deviate sexual crimes is always admissible in a criminal prosecution is based, even in its inception, upon misanalysis and inadequate reasoning. Any examination of the other cases relied upon by the *Markins* court discloses a similar lack of clear reasoning.

In *Lawson v. State*,[19] the defendant was convicted of adultery. As in *Jenness*, the factual situation, having been restricted to identical parties and crimes, limits the scope of *Lawson*, rendering it in-

---

[16]State v. Markins, 95 Ind. at 466; People v. Jenness, 5 Mich. at 322.

[17]5 Mich. at 322-23. The opinion refers to "previous acts . . . show concert and a common design . . . ." *Id.* at 322.

[18]95 Ind. at 466-67 (citing 5 Mich. 305 (1858) (emphasis added)).

[19]20 Ala. 65 (1852).

adequate to support the current practice of always admitting evidence of prior sex offenses even if different parties and offenses are involved.

State v. Bridgman[20] was viewed by the Indiana Supreme Court in *Markins* as having great force.[21] As in *Lawson*, the charge against Bridgman involved adultery committed between identical adults. In upholding the defendant's conviction, the court used a phrase which the current practice echoes, with only a slight modification, when it stated: "*[I]t is always proper* to show what is spoken of . . . as an adulterous disposition."[22] The dictum of *Bridgman* appears to have added force to the *Markins* position that sexual deviancy is to be treated as a special exception to the rule of evidence prohibiting the admissibility of testimony showing prior crimes by the accused. The current Indiana practice in which evidence of prior deviate sex crimes will always be admissible appears to be little more than a rephrasing of the court's unsubstantiated and illogical statement regarding evidence tending to show an "adulterous disposition." The broad modern application of *Bridgman* ignores the fact that in *Bridgman* the court was concerned only with showing the defendant's willingness to commit adultery repeatedly with one specific partner. The modern cases have expanded the *Bridgman* view, without justification, to include instances where the defendant committed

---

[20]49 Vt. 202 (1876).

[21]State v. Markins, 95 Ind. at 468 (citing State v. Bridgman, 49 Vt. 202 (1876)).

[22]49 Vt. at 211. The actual reasoning for admitting evidence of prior claims in *Bridgman* supports a narrower proposition than that espoused by *Markins*. The evidence in *Bridgman* was admitted for the following reasons:

> The offenses charged in this case cannot, ordinarily, be committed till the restraints of natural modesty and the safeguards of common deportment and conventionality have been overcome by gradual approaches, and the relations of the parties have been changed from those usually existing between the sexes, to the most intimate. On a trial for it, the prosecutor has to overcome the presumption that these restraints and safeguards have not been broken over. To do this, it is always proper to show what is spoken of . . . as an adulterous disposition, and . . . as a habit of adulterous intercourse. . . . Thus, it appears that the true relation of the parties to each other in this respect, is very material and proper to be shown; and there could be nothing more potent, to show that no barrier of modesty or manners was remaining between the parties, and to show the real relation between them, than the fact that they were in the habit of committing the act from time to time . . . . *But this relation of intimacy, as before suggested does not usually take place suddenly, and the fact of its existence at any time to that extent that intercourse was actually had, would be some evidence that the relation had been existing previously*; and offered with evidence of other acts so as to show the relation to be continuous through a period covering the time in question, would be quite material and convincing.

49 Vt. at 210-12 (emphasis added).

different crimes with several different persons. The shortcomings of such an expansion are obvious since the fact that one person commits adultery repeatedly with another person differs markedly from the situation where sodomy with one person is introduced to show a propensity to commit incest with another individual. *Markins*, *Bridgman*, *Lawson* and *Jenness* provide no foundation for expansion of their limited policy admitting evidence of prior crimes in sexual offenses involving identical crimes and parties to the much broader, modern position that such evidence should always be admissible even if different sex crimes and parties are involved. The problems of non-identical crimes and parties, plus the questionable creation of a special exception to the evidentiary rule precluding testimony of prior crimes, makes *Markins* a shaky foundation upon which to base the current Indiana practice.

The faulty analysis involved in *Markins* was soon obscured by *Ramey v. State*[23] and *Lefforge v. State*.[24] Those cases ignored the problems with the reasoning of *Markins* and simply cited the case to justify admission of evidence showing prior sexual crimes committed by the defendant so that a jury could better adjudge the character of the defendant.[25] Thus, by the process of repeated citation without substantive analysis, *Markins* emerged as the Indiana decision clearly establishing that deviate sex crimes constituted a special exception to the rule of evidence prohibiting introduction of testimony regarding prior crimes.

Over thirty years passed before Indiana courts again attempted to justify the treatment of deviate sexual crimes as a special exception to the evidentiary rule prohibiting the introduction of evidence regarding crimes by the defendant. In *Borolos v. State*,[26] the Indiana Supreme Court sustained a conviction for sodomy in which evidence of prior sex crimes by the defendant was considered by the jury. The prosecuting witness testified that the defendant would meet boys at a designated spot in the woods, at which time the defendant would give the boys money, cigarettes and moonshine in exchange for allowing the defendant to commit acts of sodomy upon them. The evidence regarding the defendant's method of conduct indicated that a common scheme or design was being utilized by the defendant, justifying the admision of the evidence on the basis of a general ex-

---

[23]129 Ind. 243, 26 N.E. 818 (1891).

[24]129 Ind. 551, 29 N.E. 34 (1891).

[25]*Lefforge* also cited Ramey v. State, 127 Ind. 243, 26 N.E. 818 (1891); Thayer v. Thayer, 101 Mass. 111 (1869); State v. Pippin, 88 N.C. 646 (1877); State v. Kemp, 87 N.C. 538 (1882); and State v. Bridgman, 49 Vt. 202 (1876).

[26]194 Ind. 469, 143 N.E. 360 (1924).

ception to the rule prohibiting evidence of prior crimes to be considered by juries in criminal cases.[27] In dictum, however, the court stated that the rule of admitting evidence of prior crimes with common schemes or plans is particularly applicable to trials for sexual offenses.[28] The language in *Borolos* is unclear as to whether the admissibility of the evidence was based upon the well-recognized general exceptions of intent, motive, knowledge, plan and identity, or if, instead, the court considered prior sexual crimes as constituting a separate and specialized exception to the rule prohibiting introduction of evidence of prior crimes.[29] Later Indiana courts evidently were not confused by the statement since later cases dogmatically assert that *Borolos* stands for the proposition that sexual crimes constitute a specialized exception to the evidentiary rule preventing juror consideration of prior crimes.[30] Due to the numerous citations to *Borolos* in later Indiana cases, *Borolos* must be considered as the key Indiana decision allowing juror consideration of evidence showing prior sex crimes.

An analysis of the cases relied upon in *Borolos* does not provide a definite conclusion regarding the court's intent, or explain why *Borolos* may be so assuredly cited in support for the admissibility of evidence showing prior deviate sex crimes. In general, the cases cited by *Borolos* tend to treat the admission of such evidence as being based upon the normal exceptions to the introduction of evidence showing prior crimes, rather than due to the carving out of a specialized exception in cases involving deviate sex crimes. The first case relied upon in *Borolos* was *State v. Place*,[31] a prosecution for assault with intent to commit sodomy. The crime was committed

---

[27]*Id.* at 473, 143 N.E. at 361.

[28]*Id.* The court in *Borolos* hinted at special treatment for sex crimes by stating:

> But where the evidence discloses a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others, or offers an explanation of facts that, unexplained would tend to discredit the evidence introduced by the state, evidence of other crimes than the one charged in the indictment is sometimes admissible; and this rule is particularly applicable to trials for sexual offenses.

Id.

[29]*Id.*

[30]The significance of *Borolos* is indicated by its citation for the proposition that evidence of prior sex crimes is always admissible. *See* Gilman v. State, 258 Ind. 556, 282 N.E.2d 816 (1972); Miller v. State, 356 Ind. 296, 268 N.E.2d 299 (1971); Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964); State v. Robbins, 221 Ind. 125, 46 N.E.2d 691 (1943).

[31]5 Wash. 773, 32 P. 736 (1893), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 361.

on a moving train in the state of Washington. Evidence introduced at trial disclosed that the defendant had committed a "like assault" upon another passenger just two hours earlier while aboard the same train. The distinctive factual situation in *Place* clearly made the evidence relevant to show the existence of common plan or identity. If the evidence were admitted on that basis, then no support may be drawn from *Place* to uphold the admission of the evidence based upon a special exception to evidentiary rules.

In *Barnett v. State*,[32] the defendant was prosecuted for acts of sodomy allegedly committed upon a small girl who had been lured into his automobile. Evidence of other assaults by a man with an auto matching the description of the defendant's was admitted at trial.[33] The evidence of similar attacks on small girls was considered highly relevant in determining the identity of the attacker since automobiles matching the description of the defendant's were rare in 1921. The ultimate use of the evidence to determine that the defendant was the attacker indicates that the admission of the evidence was based more upon the exception allowing evidence of prior crimes to prove identity, rather than upon an exception allowing the testimony solely because deviate sex crimes were involved.

Also relied upon by *Borolos* was *State v. Desmond*,[34] a prosecution for assault with intent to rape in which the defendant was charged with having lured three girls backstage after a theatrical performance under the guise of giving them free tickets for a later performance. At trial evidence was admitted indicating that the defendant had individually taken each girl backstage to a hidden location where he committed the assaults. The testimony of the first two assaulted girls was presented to secure the defendant's conviction for the third assault. The court was impressed by the similarity of details in the testimony of each girl indicating that the principal justification in allowing the evidence was that such testimony disclosed a common plan or intent by the defendant.[35] The introduction of testimony regarding prior sexual assaults cannot be rationalized in a manner which would support the admission of evidence based only upon the fact that a deviate sexual crime was involved. Thus, a significant number of the cases cited by *Borolos* admitted the evidence of prior sex crimes based upon the usual exceptions to the rule prohibiting such testimony.

---

[32]104 Ohio St. 298, 135 N.E. 647 (1922), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 361.

[33]104 Ohio St. at 302, 135 N.E. at 648.

[34]109 Iowa 72, 80 N.W. 214 (1921), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 362.

[35]109 Iowa at 76-77, 80 N.W. at 215.

Three of the cases cited by *Borolos* involve the admission of testimony regarding prior offenses to explain unique circumstances or peculiarities in the testimony of prosecuting witnesses. In *State v. Hummer*,[36] no written record was taken regarding a complaint made by the prosecuting witness charging that the defendant had molested her. To explain the unusual circumstance that no record of the complaint was made, the court allowed the prosecution to demonstrate that numerous other reports regarding the defendant filed by other individuals were never recorded. The large number of reports charging the defendant with sexual attacks was used to bolster the credibility of the prosecuting witness, resulting in the defendant's eventual conviction. This introduction of reports to show prior crimes by the defendant was clearly intended to explain a highly unusual factual situation instead of being admitted simply because of the involvement of a deviate sexual offense. In *Harmon v. Territory*,[37] evidence was admitted regarding a sexual attack upon the witness's sister immediately prior to the attack upon the prosecuting witness. The evidence was offered not to show the guilt of the defendant in a sex crime, but for the purpose of establishing why the sister failed to go to the aid of the prosecuting witness.[38] Finally, in *People v. Fultz*,[39] evidence showing that the defendant had repeatedly raped the minor witness over a period of several months prior to the charged offense was introduced to explain why the child suffered no pain, or swelling or laceration of her vagina during the alleged attack.[40] The defendant's conviction for incest was upheld because the evidence of prior crimes was utilized to explain a factual occurrence rather than merely to show the defendant's criminal disposition to commit deviate sexual offenses.[41]

In each case cited by *Borolos*, testimony of prior sexual crimes was admitted into evidence. The precise justification for allowing the introduction of that evidence varied. None of the cases cited by *Borolos*, however, admitted testimony regarding prior offenses simply on the basis that the cases involved deviate sex crimes. In light of the cases relied upon by *Borolos* and the unclear language present in that case, it is difficult to imagine why this Indiana case is

---

[36]72 N.J.L. 328, 62 A. 388 (1905), *cited in* Borolos v. State, 194 Ind. at 472, 143 N.E. at 362.

[37]15 Okla. 147, 79 P. 765 (1905), *cited in* Borolos v. State, 194 Ind. at 473, 143 N.E. at 362.

[38]15 Okla. at 159-60, 79 P. at 769-70.

[39]109 Cal. 258, 41 P. 1040 (1895), *cited in* Borolos v. State, 194 Ind. at 477, 143 N.E. at 363.

[40]109 Cal. at 259, 41 P. at 1041.

[41]*Id.*

considered to stand for the proposition that evidence of prior offenses is always relevant in prosecutions for deviate sex offenses. The citation of *Borolos* as having firmly established that deviate sexual prosecutions must be specially exempted from the evidentiary rule prohibiting the introduction of prior crimes is at best questionable, and at worst a gross misanalysis of the case law behind the reasoning of *Borolos*.

The slow evolution of the evidentiary practice whereby Indiana courts admitted evidence of prior crimes was accelerated by *State v. Robbins*.[42] The defendant in that case was a local judge accused of conducting acts of sodomy within his private chambers. Evidence of prior deviate sexual activity by the judge was presented in order to render the charges more probable.[43] The Indiana Supreme Court held the evidence admissible on the ground that sexual crimes are not subject to the general rules regarding the admissibility of evidence.[44] In support of that belief, the court cited *Jenness*, *Barnett* and *Borolos*.[45] However, the court in *Robbins* did attempt to probe the reasons why sexual crimes constituted a special exception to the rules of admissibility of evidence. *State v. Reineke*[46] was seized upon as justification for the special treatment afforded evidence of prior deviate sex crimes.[47] The Ohio decision considered sexual offenses as

---

[42]221 Ind. 125, 46 N.E.2d 691 (1943). *Robbins* also reversed *Lovell* which had been viewed by *Markins* as a sound opinion relating to evidentiary practices in sex crimes. The reasoning for the reversal was stated:

> Our holding as to the fifth and sixth assignments (offenses occurring two days after the date of the offense for which he was being tried) is not compatible with the decision in *Lovell v. State*, (1859), 12 Ind. 18. The court therein lays most stress on the element of surprise, saying, ". . . it cannot be expected that he will be prepared to defend himself against any charge other than that exhibited against him." But in the Markins case the court did not let that argument deter it from holding that prior similar offenses were admissible in prosecutions for sexual crimes. Judge Elliott attempts to distinguish the Lovell case on the ground that prior acts "constitute the foundation of an antecedent probability; but where they follow the main offense their force and effect are materially different." We think this argument is met by Judge Wanamaker in the Reineke case. The probability of the offense having occurred is supported by the proof of subsequent acts, not too remote, although the weight of the evidence may not be so great as evidence of prior acts.

Id. at 139, 46 N.E.2d at 696.

[43]*Id.* at 135, 46 N.E.2d at 694. The trial court was held to have erred in excluding the evidence. *Id.*

[44]*Id.* at 129, 46 N.E.2d at 695.

[45]*Id.* (citing Borolos v. State, 194 Ind. 469, 143 N.E. 360 (1923); People v. Jenness, 15 Mich. 305 (1858); Barnett v. State, 104 Ohio St. 298, 135 N.E. 647 (1922)).

[46]89 Ohio St. 390, 106 N.E. 52 (1914).

[47]State v. Robbins, 221 Ind. 125, 137-38, 46 N.E.2d 691, 696 (1943) (citing State v. Reineke, 89 Ohio St. 390, 394, 106 N.E.2d 52 (1914)).

being "crimes in continuando," since it was a matter of common knowledge that the "lecherous and bestial disposition" of the defendant would continue to exist toward the prosecuting witness.[48]

The opinion in *Reineke* fails to provide a logical justification for admitting evidence of prior sexual offenses to show the defendant's criminal propensity. That failure is due, in part, to two reasons which emerge from a critical examination of *Reineke*. Each independently limit *Reineke* so as to render it useless as a basis for supporting *Robbins*. First, the evidence in *Reineke* was admitted only to indicate a predisposition towards sexual misconduct between the defendant and one particular party.[49] Without offering any justification, *Robbins* sought to apply the limited holding of *Reineke* to a third-party situation. The fallacy of such an expansion is obvious because the fact that one person desires to continue an adulterous relationship with another person to whom he is attracted has little or no bearing to a prosecution involving the same defendant but differing crimes and individuals. The dissimilarities are too striking to support the interchangability of the evidence. Second, the prejudicial impact of allowing the jury to consider the evidence of prior sexual misconduct was ignored in the *Reineke* analysis.[50] Such an oversight is significant because it was the fear of undue prejudice which was responsible for the creation of the evidentiary rule prohibiting the introduction of evidence showing prior sex crimes.[51]

IV. Modern Indiana and Federal Views Regarding Introduction of Evidence Showing Prior Deviate Sexual Offenses

Growing dissatisfaction with the old justification for always admitting evidence of prior sexual misconduct by the defendant resulted in the landmark Indiana decision of *Meeks v. State*.[52] The defendant in *Meeks* was convicted of rape through the introduction of evidence showing separate, but similar crimes by the defendant which occurred several weeks prior to the offense charged. The Indiana Supreme Court in *Meeks* issued an opinion which dramatically rejected the reasoning of those earlier decisions. Without elaborating, the court departed from the long line of cases originating with *Markins* which had held evidence of prior crimes to be admissi-

---

[48]State v. Reineke, 89 Ohio St. at 394, 106 N.E. at 53.

[49]*Id.*

[50]*See* State v. Reineke, 89 Ohio St. 390, 106 N.E. 52.

[51]B. Jones, *supra* note 1, § 4:18.

[52]249 Ind. 659, 234 N.E.2d 629 (1968). *Meeks* is significant because the case broke with the past doctrine of admissibility in sexual cases and adopted a completely opposite position.

ble in prosecutions for deviate sexual offenses based upon a special exception to the rules of evidence.[53] In rejecting the special treatment afforded prosecutions for sexual offenses, the court stated: "[T]here are limitations to the above doctrine."[54] The *Meeks* opinion did state the reasons for such limitations:

> The rule now being, if an individual is on trial for a crime involving abnormal sexual intercourse, evidence of other improper acts of sexual intimacy are always admissible. *We believe this can be a dangerous situation.* An individual on trial for a sexual offense should be afforded the same evidentiary safeguards against irrelevant prejudicial testimony as an individual on trial for another felony.[55]

Recognition of the injustice of admitting evidence showing prior sexual crimes by the defendant was due, principally, to the Fourth Circuit decision in *Lovely v. United States*.[56] In that case the court ex-

---

[53]*Id.* at 662, 234 N.E.2d at 631.

[54]*Id.*

[55]*Id.* at 664, 234 N.E.2d at 632 (emphasis added).

[56]169 F.2d 386 (4th Cir. 1948), *cert. denied*, 338 U.S. 834 (1949). The rationale underlying *Lovely* clearly supports the language of *Meeks*. The *Lovely* court stated its rationale as follows:

> It is true, of course, that evidence which has a reasonable tendency to establish the crime charged in the indictment is not rendered inadmissible merely because it establishes another crime; and the question which arises with respect to this sort of evidence is whether or not it has such tendency. In ordinary cases, it is perfectly clear that evidence of other crimes committed by the accused has no such tendency and is properly excluded as irrelevant. Evidence of the commission of similar offenses closely related in time and place may, however, be relevant on such matters as identity, guilty knowledge, motive or intent, where these are in issue, or may tend to establish a criminal plan or design out of which the crime charged has originated; but it is well settled that such evidence is not admissible where it has no relevance or probative value except insofar as it may show a tendency or likelihood on the part of the accused to commit the crime . . . . The rule which this forbids the introduction of evidence of other offenses having no reasonable tendency to prove the crime charged, except insofar as they may establish a criminal tendency on the part of the accused, is not a mere technical rule of law. It arises out of the fundamental demand for justice and fairness which lies at the basis of our jurisprudence. *If such evidence were allowed, not only would the time of the courts be wasted in the trial of collateral issues, but persons accused of crime would be greatly prejudiced before juries and would be otherwise embarrassed in presenting their defenses on the issues really on trial* . . . . It is the product of that same humane and enlightened public spirit which, speaking through our common law, has declared that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.

Id. at 388-89 (emphasis added).

cluded evidence of prior rapes committed by the defendant for use as evidence in his subsequent prosecution for rape on the ground: "[I]t showed merely that he was a bad man, likely to commit that sort of crime; and this is precisely what the prosecution is not allowed to show in a criminal case."[57] Prior to *Lovely*, the federal courts had allowed in rape cases evidence of prior sexual crimes to be presented before the jury.[58] Evidence of prior sexual crimes had been admissible in federal courts even if non-identical third parties were involved.[59] Sections of the *Lovely* opinion appear to pierce the language used by the earlier federal decisions in *Hodge v. United States*[60] and *Bracey v. United States*,[61] recognizing that the "disposition" mentioned by those opinions was little more than restating that the defendant was a bad man.[62] The relevancy of "criminal disposition" in deviate sex crimes was unchallenged in both *Hodge* and *Bracey*. Lacking relevance, such evidence should be excluded.

Unfortunately, the *Lovely* decision limited its reasoning to rape prosecutions. That restriction, although illogical, appears to be based upon a belief that crimes such as sodomy and incest are due to a perverted sexual instinct while crimes of rape do not reflect a similar instinct.[63] Such a conclusion, whether viewed from the position of a rape victim or a detached member of society, appears irrational and unbelievable. As stated at the outset of this Note, *all* deviate sex offenses involve highly emotional legal and moral issues. This conclusion remains constant whether the actual charge is rape or sodomy because the jury's reactions to prosecutions of this type are similar. The natural prejudice of a jury towards a deviate sex offender creates a situation in which the defendant may be wrongfully convicted due to emotional responses by that jury. Thus, it is essential that a defendant be provided adequate evidentiary safeguards to protect him from wrongful conviction. The safeguards afforded defendants in rape prosecutions by *Lovely* should be just as accessible to defendants on trial for other sexual offenses because the prosecutions involve similar charges and emotional responses by the jury. The *Lovely* distinction between evidence in rape prosecutions and evidence of other sexual crimes was not emphasized by the In-

---

[57]*Id.*

[58]Weaver v. United States, 299 F. 893 (D.C. Cir. 1924).

[59]Bracey v. United States, 142 F.2d 85 (D.C. Cir. 1944), *cert. denied*, 322 U.S. 762 (1944).

[60]126 F.2d 849 (D.C. Cir. 1942).

[61]142 F.2d 85 (D.C. Cir. 1944).

[62]169 F.2d at 388.

[63]*See* Trautman, *Logical or Legal Relevancy—A Conflict in Theory*, 5 VAND. L. REV. 385 (1952).

diana decision in *Meeks*. The lack of this distinction resulted in many later decisions declining to follow *Meeks* because, without such limiting language, *Meeks* signaled a complete rejection of the specialized exception to the rules of evidence fashioned by *Markins*, *Borolos* and *Robbins*. The refusal to follow *Meeks* in cases involving sexual offenses other than rape resulted in strong dissenting opinions by various judges attacking the court's retreat. The first of those dissents was found in *Kerlin v. State*,[64] a sodomy prosecution in which the dissent of Justice DeBruler criticized the practice of always permitting the state, in prosecutions involving abnormal sexual intercourse, to introduce evidence of other sex crimes. The justice considered such a practice as an "unjustified departure from the rule of relevance."[65] Justice DeBruler indicated that, in his opinion, the court in *Meeks* had rejected the "per se exception" to the rule of relevance previously afforded evidence of prior sex offenses.[66] The dissent of Justice DeBruler in *Kerlin* was echoed and amplified by the dissenting opinion of Justice Prentice in *Gilman v. State*.[67] In that opinion the justice argued that restriction of *Meeks* to only rape prosecutions was illogical:

> The majority opinion dismisses the *Meeks* case . . . with the comment that the only issue therein was one of consent, the sexual act having been admitted. I fail to see where this removes the case at bar from the rule. The evidence of the prior alleged offense in no way shows any of the five elements above enumerated and should have been excluded.[68]

In both *Kerlin* and *Gilman*, the dissenting justices recognized that, although the factual situations in those cases differed from that in *Meeks*, the principles and factors involved in the cases remained constant and interchangeable. In all the cases, evidence was allowed to show that the defendant had committed a prior sexual offense. Each case admitted the evidence as relevant in determining the defendant's criminal propensity. In light of these similarities, it is

---

[64]255 Ind. 420, 265 N.E.2d 22 (1970) (DeBruler, J., dissenting).

[65]*Id.* at 426, 265 N.E.2d at 26 (DeBruler, J., dissenting).

[66]*Id.*

[67]258 Ind. 556, 282 N.E.2d 816 (1972) (Prentice, J., dissenting).

[68]*Id.* at 559, 282 N.E.2d at 818 (Prentice, J., dissenting) (quoting Miller v. State, 256 Ind. 296, 302-03, 268 N.E.2d 299, 303 (1971)). Justice DeBruler, concurring in the dissent of Justice Prentice, indicated that the mere characterization of an offense as a deviate sex crime should not affect the normal balancing process between relevancy and prejudicial impact when he stated: "Calling this prior crime evidence of a 'depraved sexual instinct,' whatever that phrase means in modern terminology, does not make this highly prejudicial evidence relevant in any manner to the case at bar." *Id.* at 558, 282 N.E.2d at 819 (DeBruler, J., dissenting).

difficult to imagine why the opinion in *Meeks*, which viewed such practices as prejudicial, dangerous and unjustified, was ignored in both *Kerlin* and *Gilman*.

Despite the sound logic of *Meeks* and strong dissenting opinions by various judges, the Indiana courts have continued to adhere to the practice of always admitting evidence of prior deviate sex offenses in criminal prosecutions for sex crimes.[69] No explanation for the rejection of the *Meeks* reasoning has been given in recent opinions, other than the mere repetition of the *Markins* notion that evidence of prior sex crimes illustrates the defendant's criminal disposition.[70]

The post-*Meeks* upheaval in the Indiana Supreme Court is a result of the shallow pre-*Meeks* justification for admitting highly prejudicial information regarding prior sex offenses by the defendant. Typical of that shallow analysis is the justification offered by *Lawrence v. State*[71] in which the court stated: "The admissibility of prior convictions in such cases is justified only by their relevance to the issues. The undesirable tendency to prejudice remains, but the overriding interests of the State in arriving at the truth prevails."[72] The *Lawrence* reasoning requires several assumptions to remain viable. First, it assumes that, given the evidence of prior crimes, the jury will determine the truth despite their own prejudices. Second, the justification takes for granted that evidence of prior sexual offenses is a valid indication of recidivism. Finally, the *Lawrence* justification implies that, in prosecutions for sexual offenses, the search for truth outweighs all other considerations, including the possibility that undue prejudice may result from that search. The illogic of the final assumption is significant because, in the American legal system, no practice can be justified if the ultimate result of its application is the conviction of innocent individuals due to juror prejudice. Perhaps no innocent defendants have been convicted by Indiana courts because of jury consideration of evidence showing a history of deviate sex offenses by defendants. The potential for such a miscarriage of justice, however, is great in view of the jurors' constant exposure to highly prejudicial information containing little probative value.

If the scales of justice are to be weighted in favor of admitting testimony regarding prior deviate sexual offenses instead of shielding the defendant from the natural prejudice likely to flow from

---

[69]*See, e.g.*, Woods v. State, 250 Ind. 132, 235 N.E.2d 479 (1968).

[70]*See, e.g.*, Merry v. State, 335 N.E.2d 249 (Ind. Ct. App. 1975).

[71]259 Ind. 306, 286 N.E.2d 830 (1972).

[72]*Id.* at 310, 286 N.E.2d at 833.

such a disclosure, the rationale for admitting that evidence should be clear and convincing. Unfortunately, the Indiana rationale for allowing such evidence is plagued by inconsistencies and basic misconceptions. The problems inherent in the current practice of always admitting evidence of prior deviate sex crimes illustrates that an ironclad solution regarding whether to admit such evidence is not possible. The Federal Rules of Evidence stress that in such situations, flexibility is necessary. Rule 403 regarding the exclusion of relevant evidence emphasizes that flexibility, stating: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, . . . or needless presentation of cumulative evidence."[73] Exclusion of evidence showing prior crimes is specifically dealt with by Federal Rule 404(b) which states:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. This subdivision does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.[74]

The terms utilized by each rule reflect the realization that no mechanical solution can be offered to indicate when certain types of evidence must be excluded.[75] The federal evidentiary rules neither automatically admit nor exclude evidence of prior crimes. Instead, the rules allow the application of a balancing test to determine if the relevancy of the evidence outweighs its prejudicial impact.[76] Indiana law declines to follow the practice provided by the Federal Rules of Evidence, substituting instead its own automatic exception to the rules of evidence in which testimony showing prior sexual conduct is always admitted.[77] This refusal by the Indiana courts to consider the factors of relevancy and prejudice on a case-by-case basis has created a situation in which the defendant's right to a fair trial may be violated. To avoid the possibility of such a violation, the Indiana courts should adopt the flexible federal balancing test or otherwise provide for a more restrictive practice of admissibility in prosecutions for deviate sexual offenses.

Several possible alternatives are available to restrict the Indiana practice. The least restrictive of these alternatives would limit

---

[73]FED. R. EVID. 403.

[74]FED. R. EVID. 404(b).

[75]*See*, FED. R. EVID. 404(b) (Advisory Committee Note), 56 F.R.D. 183, 221 (1972).

[76]*Id.*

[77]*See generally* Lamar v. State, 245 Ind. 104, 195 N.E.2d 98 (1964).

the admission of evidence showing the defendant's involvement in prior sex offenses to prior *convictions*. Currently, evidence of any act involving a deviate sexual offense may be admitted to show the defendant's propensity to commit such crimes.[78] That evidence of prior crimes may consist of either actual conviction of the defendant or mere accusations of a sexual offense.[79] Restricting the admissibility of evidence showing prior deviate sex crimes to only those instances in which the defendant had been convicted of that prior offense would afford the defendant a minimal safeguard against prejudicial evidence.

If evidence only of prior convictions were admissible, courts would avoid the possibility of a defendant's conviction based solely on the accusation of a young girl.[80] Under current Indiana law, such evidence would be considered admissible. Thus, the suggested safeguard is a logical preventive measure which would serve a useful function, especially in cases involving sexual crimes.[81]

Another possible restriction limiting the admissibility of evidence showing prior sexual misconduct derives its basis from early case law weighing the relevance of such evidence. Those cases limited the admissibility of prior crimes to only those cases involving identical parties.[82] This limitation, based upon historical practice, restricted the admissions of highly prejudicial testimony to instances in which a high degree of probability existed of a continuing, illicit relationship. This early view was founded upon the assumption that certain crimes involve ongoing interpersonal emotional relationships.[83] Therefore, the courts validly concluded that, in situations such as adultery, the continuing nature of the relationship made evidence of prior sexual familiarity between the parties very relevant to the subsequent prosecution. The courts clearly intended the relevance of the evidence indicating prior crimes to be based on a defendant's previous adulterous attitude.[84] By restricting the current practice of always admitting evidence of prior sexual misconduct to only those instances involving identical parties, the courts would more closely follow the intentions of early case law, and, at

---

[78]*Id.* at 109, 195 N.E.2d at 101.

[78]Whitty v. State, 34 Wis. 2d 278, 149 N.W.2d 557 (1967).

[80]The reader should remember that the fertile imaginations of young girls were responsible for the Salem Witch Trials.

[81]Easterday v. State, 254 Ind. 13, 256 N.E.2d 901 (1970), recognized that young girls sometime create imaginary lovers, resulting in groundless but damaging accusations in trials for sexual offenses.

[82]*E.g.*, Lefforge v. State, 129 Ind. 551, 29 N.E. 34 (1891); Thayer v. Thayer, 101 Mass. 111 (1869).

[83]*See* State v. Bridgman, 49 Vt. at 211-12.

[84]*Id.*

the same time, restrict the admission of highly prejudicial evidence to only those instances in which it has a high degree of relevance.

The final restriction available to curtail the current practice of always admitting evidence of prior deviate sexual crimes in later criminal prosecution is to totally abolish that practice, adopting the position of *Meeks*. The current practice whereby evidence of prior sexual offenses may always be admitted to show the defendant's criminal propensity is based upon the unproven notion that sexual offenders are notorious repeaters of their crimes.[85] The continued existence of the special exception will result in the continued danger that innocent defendants will be convicted.

A final, yet significant benefit of the total abolition of evidence showing prior deviate sex crimes would be a decrease in the introduction of irrelevant, prejudicial information, thereby increasing the likelihood that the defendant would be treated fairly and equally by the law. All defendants are entitled to equal treatment by the judicial system. Restrictions upon the admissibility of evidence showing prior sexual misconduct would enhance the defendant's chances for equality since he would no longer be treated as a second-class citizen, tainted by his past actions. The continued existence of a specialized exception to the evidentiary rules perpetuates in deviate sexual prosecutions that unequal treatment and, thus, should be abolished to avoid undue prejudice to the defendant.

If the special exception status afforded evidence of prior deviate sex crimes were abolished, the result would not be the total exclusion of such evidence in all instances. The evidence still could be admitted under the general exceptions of showing intent, common scheme, plan, identity or motive, if the requirements for those exceptions were met. In extraordinary circumstances, evidence of prior sex crimes could be admitted to explain highly peculiar circumstances regarding the testimony of a prosecuting witness.[86] Thus, the abolition of the special exception status of evidence showing prior deviate sex offenses would not mean that such evidence was forever lost to the prosecutor. The evidence would be excluded only if it were introduced to show the criminal propensity or disposition of the defendant. In this regard, the prohibition against the introduction of any prior offense for the purpose of proving a criminal disposition may be viewed more as a limitation on the purpose for

---

[85]*See* State v. Reineke, 89 Ohio St. at 391, 106 N.E. at 53.

[86]Harmon v. Territory, 15 Okla. 147, 79 P. 765 (1905), clearly illustrates the necessity for allowing the jury to consider evidence of other sex offenses in order for the jury to more fully appreciate the unusual factual situation presented by the prosecutrix's testimony.

which such information may be used, rather than a complete ban upon the admissibility of evidence showing prior offenses.

VI. CONCLUSION

Balancing the prejudicial impact of evidence against its probative value is a difficult and imprecise task. Indiana courts have continually refused to even attempt such a balancing test in prosecutions for deviate sex crimes if evidence of prior offenses by the defendant is available. Instead, the courts have fashioned a special exemption from the rule of evidence prohibiting the introduction of testimony designed to show the defendant's criminal disposition. The scales are always weighted in favor of the state.

Based only upon notions of logic, precedent and the balancing of relevancy against prejudicial effect on defendants, it is difficult to understand the evolution of a special exception to the rule of exclusion for sexual crimes. To some extent, the exception must be a product of the emotional response of the courts to sexual crimes.[87] Judges, defendants and scholars have continually urged a retreat by the courts from this untenable position.[88] At some point, logic must overcome emotion and dictate that the possibility of undue prejudice to the defendant on trial for a sex offense is so great that the exclusion of evidence showing prior offenses by the defendant is justified. The Federal Rules of Evidence provide sufficient flexibility to allow that conclusion, but the per se exception to the rule of admissibility of evidence followed by Indiana courts does not provide for such a conclusion.

The current practice of automatically allowing evidence of prior

---

[87]Gregg, *Other Acts of Sexual Misbehavior and Perversion as Evidence in Prosecutions for Sexual Offenses*, 6 ARIZ. L. REV. 212 (1965).

[88]*See* notes 52-68 *supra* and accompanying text. *See also* Editorial Note, *Evidence of Defendant's Other Crimes: Admissibility in Minnesota*, 37 MINN. L. REV. 608 (1953), in which the use of prior convictions as evidence in a later trial was criticized:

> The court has been most liberal in admitting evidence of other crimes in the sex crime cases, and has even admitted it to show an inclination of the defendant to commit the crime charged. The distinction between evidence showing an inclination, which can be shown in these cases, and a disposition, which is supposedly never admissible, is dubious at best . . . . The court's liberality in admitting evidence in this type of crime is somewhat illogical. Since natural prejudice against the sex offender is so great, it would seem that he should be afforded more, rather than less protection. The reason for this liberal admissibility is not clear but appears to rest on a belief that other acts which the prosecutrix show lust of the defendant for this particular girl rather than mere disposition to commit this type of crime.

Id. at 614.

deviate sex offenses to be considered by the jury in determining the defendant's guilt for another offense is inflexible and illogical. It should, therefore, be discarded. The time has arrived to provide all individuals on trial for sexual offenses the same evidentiary safeguards against irrelevant prejudicial testimony as those afforded to individuals on trial for other felonies.

DAVID F. SNIVELY

Leading Articles and Comments

Notes—Titles

Table of Cases

C

I

T

Index-Digest

Page references in bold-faced type are to Leading Articles and Comments. Page references in italics are to Notes. Page references in plain type are to Recent Developments.

A

B

C

D

DAMAGES

DECEDENT'S ESTATES

E

F

I

L

P

S